UNIVERSITY OF ALBERTA

Enhancing Corporate Social Responsibility in Nigeria's Oil and Gas Producing Communities: A Contextual Analysis

by

Evaristus Akhayagboke Oshionebo ©

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Master of Laws.

Faculty of Law

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ABSTRACT

The principal aim of this thesis is to prescribe ameliorative strategies, based on corporate law, to address the negative externalities of the corporate activities of multinational oil and gas companies in the oil and gas producing region of Nigeria.

In doing so, the thesis explores corporate social responsibility in Nigeria's oil and gas producing communities and contends that the multinationals, due mainly to their insensitivity or irresponsibility to the interests of their host communities, are partly responsible for the environmental and human rights crisis in that region of the country. It recommends that Nigerian corporate law be amended to include a mandatory corporate social responsibility regime that compels corporate directors to consider the interests of their host communities contemporaneously with those of the shareholders in the corporate decision making process as the antidote to the lingering environmental and human rights crisis in those communities. It also considers how the law of countries like Canada and the United States can be deployed by shareholders to hold corporations doing business in Nigeria to the standard of corporate responsibility.

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INTRODUCTION

I. Overview

Petroleum, in commercially viable quantities, was first discovered in Nigeria in the sleepy town of Oloibiri in 1956. The Royal Dutch/Shell and British Petroleum then had the exclusive rights to most, if not all, of the oil fields in the country.[1] Other players in the oil and gas industry soon joined in what can literally be described as a scramble for oil in Nigeria. Since the commercial exploitation of oil began in Nigeria, oil has consistently accounted for a greater part of the country's export earnings.[2] In the 1970s, the economy of the country blossomed due largely to oil boom. However, as a result of a persistently visionless leadership, a greater part of which was forced on the Nigerian people by the military class, oil exploration and exploitation has turned into a curse for the people of the Niger-Delta. Activities of the oil companies have led to massive environmental degradation and pollution. Attempts by the inhabitants of the area to protest against such environmental degradation and pollution have led and still leads to repressive measures on the part of the Nigerian government[3] whose conduct, in this regard, is sometimes supported or condoned by the oil companies. The height of such repression was reached in 1995 when, against all known precepts of the rule of law, the military government of General Sani Abacha, a dictator of the highest order, executed Mr. Ken Saro- Wiwa and eight others for daring to protest against the environmentally devastating activities of Shell Petroleum Development Company and other oil companies in Ogoni-land.

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[1] See E.J. Usoro, "Foreign Oil Companies and Recent Nigerian Petroleum Oil Policies" (1972) Vol. 14, No. 13, Nigerian Journal of Economic and Social Studies 301.

[2] Presently, the Petroleum sector provides more than 90% of the country's export earnings and more than 40% of the Gross Domestic Product. See *Nigeria: Selected Issues and Statistical Appendix, International Monetary Fund Staff Country Report No. 98/78* (Washington D.C.: August 1998) 6-11. See also, B. E. Okogu, "The Oil Sector and the Future of the Nigerian Currency: Perspective Planning Against Instability" (1995) 15:1 OPEC Rev. 13 at 14.

[3] This is underscored by the fact that out of the 9,860 Petitions submitted to the Nigerian Human Rights Investigation Commission, 8,000 came from Ogoni-land alone. That commission is mandated to ascertain or establish the causes of all gross violations of human rights committed in Nigeria between 1966 and 1999. See *Vanguard [Nigeria] Newspaper* (18 October, 2000) online <http://www.vanguardngr.com > date accessed: 18 October, 2000.

Numerous attempts have been made by Nigerian scholars to address the environmental and human rights crisis in Nigeria's oil and gas producing communities.[4] Unlike most of those previous attempts, however, this thesis shall prescribe and advance corporate law measures[5] that need be taken in order to prevent or ameliorate the environmental and human rights crisis in the oil producing communities.

I attempt, in this introductory phase, to provide a background insight into the lingering environmental and human rights crisis in Nigeria's oil and gas producing communities. That insight, it is hoped, will help situate the issues raised and arguments made in the thesis. I shall also attempt to explore herein a brief political history of Nigeria and the nature of the Nigerian government by way of background.

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[4] Those attempts were largely aimed at espousing the environmental and human rights of the inhabitants of the communities and the modes of seeking redress for the infringement of their rights. See, for example , O. Adewale, "Oil Spill Compensation Claims in Nigeria: Principles, Guidelines and Criteria" (1989) 33(1) J.A.L.91 which had, as its stated objective, the examination of the various principles applicable in cases of oil spills especially in relation to compensation claims; P. D. Okonmah, "Rights to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta" (1997) 41(1) J.A.L.43 which suggests a cause of action based on human rights law in seeking redress for injuries arising from oil pollution; A.E.Ogbuigwe, "Compensation and Liability for Oil Pollution in Nigeria" (1985) 3 Journal of Private & Property Law 23; A. Ibidapo-Obe, "Crminal Liability for Damage Caused by Oil Pollution" in J.A. Omotola, ed., *Environmental Laws in Nigeria* (Lagos: University of Lagos Press, 1990) at 247.

[5] See also, A. Guobadia, "Defining Corporate Social Responsibility for Nigeria's Oil and Gas Sector" (1991) 3 African J. of Int. & Compt. Law 472. In this article, Guobadia advocates, inter alia, corporate law remedy for the crisis in the oil and gas producing communities of Nigeria.

II. Nigeria: A Brief Political History

Nigeria gained independence from Great Britain on October 1, 1960. Prior to that date, the entity now called Nigeria was ruled by the British beginning from January 1, 1914 when the protectorates of Northern and Southern Nigeria were amalgamated. In effect, Nigeria as a political entity came into existence on January 1, 1914. Located in the western part of Africa, Nigeria is the most populous country in Africa with a population of about 88 million people.[6] It is bounded on the north by the republics of Chad and Niger, on the south by the Atlantic ocean, on the east by Cameroon, and on the west by the republic of Benin.

Nigeria is a federation made up of 36 states in addition to the Federal Capital Territory, Abuja.[7] The affairs of each state is presided over by a Governor.[8] The states are made up of Local Government Areas. Each Local Government area is presided over by a Local Government Chairman. In all, there are 768 Local Government Areas in Nigeria.[9] In effect, there are three tiers of government in Nigeria. These are: the federal government, the state government, and the local government. Except otherwise indicated, reference to 'government' or 'Nigerian government' in this thesis means 'the Federal Government of

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[6] See the 1991 National Census figures. The result of that census, which was conducted under a military government, are generally believed to be unreliable. Observers estimate that the country's population is about 120 million.

[7] See s. 3(1) and the First Schedule, Part 1 of the *Constitution of the Federal Republic of Nigeria, 1999* (hereinafter "the 1999 Constitution"). These states, arranged in alphabetical order, are: Abia, Adamawa, Akwa-Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross-River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe, and Zamfara.

[8] See s. 176 of the 1999 Constitution, *ibid.*

[9] *Ibid*, s. 3(6)

Nigeria.'

Out of the 36 states, the coastal states of Abia, Akwa-Ibom, Bayelsa, Cross-Rivers, Delta, Edo, Imo, Ondo, and Rivers account for all of the oil and gas produced in the country. These states, which share common boundaries, are the focus of this thesis and are collectively referred to hereunder as 'oil producing communities' or the 'Niger Delta'.

III. Nature of the Nigerian Government

Nigeria's attempt at governance through constitutional means is lengthy and chequered.[10] Since independence in 1960, every constitutionally elected government in Nigeria (with the exception of the present democratically elected administration of President Olusegun Obasanjo), has been toppled by the Nigerian military elite through the use of military force. So domineering has the military been in the governance of the country that it has presided over the affairs of the country for 30 years out of the 41 years (1960 - 2001) of the existence of Nigeria as an independent country.[11]

It is perhaps apposite to point out at the onset that under military governments, the executive and the legislative arms of government are fused into one and are both exercised by the military rulers. The Nigerian military rule by Decrees. The first action of the military on assumption of the reigns of government is to suspend and or modify, through a Decree, the existing Constitution and arrogate to itself absolute and unquestionable powers to make laws for the country.[12] As pointed out by the Supreme Court of Nigeria in *Military Governor of Ondo State v. Adewumi*, "each of these Decrees unequivocally and uncompromisingly declared the absolute authority of the military government, the subordination of the pre-existing legal order by rendering provisions of the erstwhile fundamental law, that is, the Constitution subordinate to the Decree...."[13] A military Decree is absolute in its operation as it confers complete authority on the military government. Therefore, in so far as any part of the Constitution survived and was applied after a military *coup d'etat*, it did so "at the benevolence, sufferance and behest of the authority of the military government."[14] Military rule is dictatorial, despotic and autocratic. Such has been Nigeria's experience. The human rights violations captured in this thesis occurred, in the main, during military rule in Nigeria.

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[10] Due principally to the frequent intrusion of the military in the governance of the country, Nigeria has, since independence, had 5 Constitutions. These are: the *1960 Constitution*; the *1963 Constitution* which formally declared the country a republic thereby severing relationship with the British monarchy; the *1979 Constitution*; the *1989 Constitution*; and the *1999 Constitution*. With the exception of the *1960 Constitution* which was voluntarily replaced by the legislature and the *1999 Constitution* which is presently in operation, all the other Constitutions were forcefully suspended and abrogated by the Nigerian military.

[11] In all, Nigeria has had eight military heads of state: Gen. Iguyi Ironsi, Gen. Yakubu Gowon, Gen. Murtala Mohammed, Gen. Olusegun Obasanjo (who, incidentally, is the present democratically elected president of Nigeria), Gen. Muhammadu Buhari, Gen. Ibrahim Babaginda, Gen. Sani Abacha, and Gen. Abdusalami Abubakar. In contrast, Nigeria has had only three democratically elected leaders including the incumbent President.

IV. The Environmental and Human Rights Crisis in the Oil Producing Communities: An Insight

The Niger-Delta, comprising well over 20,000 square kilometres, is the largest wetlands in Africa and one of the largest in the world.[15] The people of the Niger-Delta, had, long before the discovery of oil in their land, engaged mainly in subsistence farming and fishing as their primary source of livelihood. The intense and continuous prospecting for and exploration of oil in the area has had a phenomenal impact on the lives and environment of the people.[16] Their environment has consistently been polluted as a result of gas flaring and oil spills.

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[12] See, for example, the *Constitution (Suspension and Modification) Decree* No. 1 of 1966. Decrees of identical appellation were also promulgated by all successive military governments in Nigeria.

[13] (1988), 3 N.W.L.R. (Part 82) 280 at 305.

[14] *Ibid.*

[15] See Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York: Human Rights Watch, 1999) 53.

Admittedly, crude oil spills and the resultant pollution cannot be completely eliminated in any country where oil is explored.[17] However, the frequency with which oil spillages occur in Nigeria demonstrates that something is terribly wrong with the Nigerian situation. A study has shown that a total of 784 incidents of oil spillage occurred in Nigeria between 1976 and 1980.[18] That trend continues today. Despite the alarming frequency of oil spills, neither the Nigerian government nor the oil companies have carried out any substantial research on the damage caused by such spillages. It is clear, however, that oil pollution has not only led to numerous human fatalities,[19] but also to social disequilibrium. As a report by the Human Rights Watch[20] indicate,

> (i)n many villages near oil installations, even when there has been no recent spill, an oily sheen can be seen on the water, which in fresh water areas is usually the same

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[16] P. D. Okonmah, *supra* note 4 at 45.

[17] G. Etikerentse, *Nigerian Petroleum Law*, 1st. ed. (London: Macmillan, 1985) at 62.

[18] A.E Ogbuigwe, "Compensation and Liability for Oil Pollution in Nigeria" (1985) 3 Journal of Private & Property Law 23. Ogbuigwe relied on a report by S.A. Awotayo, "An Analysis of Oil Spill Incidents in Nigeria 1979-1980" in the *Petroleum Industry and the Nigerian Environment: Proceedings of the 1981 International Conference*.

[19] See J.F. Fekumoh, "Civil Liability for Damage Caused by Oil Pollution" in J.A. Omotola, ed., *Environmental Laws in Nigeria*, *supra* note 4 at 256 where he reports that in 1980, one hundred and eighty people lost their lives as a result of oil pollution in the Niger Delta. See also the report captioned "Polluted Water Kills 20 in Bayelsa Oil Spill" in *the Guardian [Nigeria] Newspaper* (8 December, 2000) online,< http://ngrguardiannews.com > date accessed: 8 December, 2000.

[20] *Supra* note 15 at 67.

water that the people living there use for drinking and washing.[21]

Studies have also revealed that oil pollution has adverse effects on fisheries in the Niger Delta while hydrocarbon contamination has been found in oysters in the area.[22]

While the exact effect of oil spillages on the environment and people of the Niger-Delta remain largely unknown due to the paucity of scientific research and data, it is undeniable that the environmental problems of the area are due either in part or wholly to the activities of the oil companies operating in that area.[23] These companies engage in intense dredging and gas flaring. Dredging destroys the ecology of the area. Gas flaring, on the other hand, has been shown, by at least one study, to have caused an increase in the air, leaf and soil temperatures thereby affecting the vegetation adversely.[24]

Attempts by the people of the Niger-Delta to protest against the activities of the oil companies have often led to repressive measures from the government. As a result, death, destruction of property, arrest and detention without trial, torture, rape and other forms of human rights abuse are common occurrences in Nigeria's oil and gas producing communities. Two incidents - the Umuechen massacres and the Ogoni crisis - served to bring home the extent of such repressive measures to the attention of the international community.[25] Those repressive measures continue today, although admittedly on a lesser scale, despite the present democratic dispensation in the country.[26] As a result of the nature of the corporate relationship between the oil companies and the Nigerian government, those companies share a part of the responsibility for those repressive measures.[27]

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[21] See also, S. Kretzmann & S. Wright, *Human Rights and Environmental Information on the Royal Dutch/Shell Group of Companies 1996-1997: An Independent Annual Report* (California: Rainforest Action Network and Project Underground, May 1997) at 6.

[22] Environmental Resources Managers Ltd., *Niger Delta Environmental Survey, Final Report,* Phase 1, Volume 1 (Lagos: Environmental Resources Managers Ltd.) at 179.

[23] See Human Rights Watch, *supra* note 15 at 68.

[24] See A. O. Isichei & W. W. Sanford, "The Effects of Waste Gas Flares on the Surrounding Vegetation in South-Eastern Nigeria" (1976) 13 Journal of Applied Ecology 177.

VI. Factors behind the Crisis

Two main factors are responsible for the environmental and human rights quagmire in the Niger Delta. These are: (1) the abuse and persistent neglect of the region by the government,[28] and (2) the corporate insensitivity or irresponsibility of the oil and gas companies in relation to the interests and rights of the oil producing communities. The first factor is outside the scope of this thesis. The latter factor, however, provides the underlying basis for the arguments and propositions made in subsequent chapters of the thesis.

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[25] A peaceful protest by the people of Umuechen led to the shooting death of at least eighty unarmed demonstrators and the destruction of 495 houses in 1990 by officers of the Nigeria Police Force acting on the strength of a request by Shell Petroleum Development Company for "security protection". See Human Rights Watch, *supra* note 15 at 123. The Ogoni crisis, on the other hand, led to the killing of Mr. Ken Saro-Wiwa and eight others in 1995 by the Military government.

[26] Soon after the restoration of civil rule in the country in 1999, the entire Niger-Delta village of Odi in Bayelsa State was completely destroyed by the Nigerian army. The Federal Government had apparently deployed soldiers to the community in an attempt to arrest alleged murder suspects. In the process, several people, including women and children, were allegedly killed. The government again deployed soldiers, in October 2001, to quell civil disturbances in Benue State. Several people were reportedly killed by the soldiers. See E. Onwubiko & F. Obinor, "Rights Commission Decries Military Action in Benue" *The [Nigeria] Guardian* Newspaper (12 November, 2001) online <http://www.ngrguardiannews.com> date accessed: 12 November, 2001.

[27] Onshore exploration and production of oil by the major oil companies in Nigeria are undertaken as Joint-Ventures with the Nigerian National Petroleum Corporation, a wholly owned government corporation. All the major oil companies have "supernumerary police" or "spy police" who are recruited and trained by the Nigeria Police Force but paid for by the oil companies. See Human Rights Watch, *supra* note 15 at 115. Shell Petroleum Development Company Limited admits it has, in the past, purchased side arms for police personnel who guard their facilities. See, J. Ollor-Obari & M. Ogunsakin, "Peace at Last in Ogoniland" *The Guardian [Nigeria]* Newspaper (25 January, 2001) online < http://ngrguardiannews.com > date accessed: 25 January, 2001. There is evidence to suggest that some of the oil companies did finance the activities of brutal security forces in the region. See Human Rights Watch, *supra* note 15 at 169.

[28] It is beyond the scope of this thesis to explore the role and the extent to which the State has participated in the perpetuation of the environmental and human rights crisis in the oil producing communities of Nigeria. Consequently, it is considered inappropriate to attempt an analysis of the part played by the Nigerian government in that regard.

Oil companies in Nigeria appear to have insufficient regard for Nigerian petroleum and environmental regulatory laws. As one learned writer has noted, "Nigeria is about the only country where oil companies operate without making adequate provisions for anti-pollution and oil spillage measures",[29] even though Nigerian law enjoins oil companies to observe international standards in their operations in Nigeria. For example, Regulation 25 of the *Petroleum (Drilling and Production) Regulations* of 1969 made pursuant to s. 8 of the *Petroleum Act*[30] mandates that oil companies:

> shall adopt all practical precautions including the provisions of up-to-date equipment approved by the Chief Petroleum Engineer, to prevent the pollution of the inland waters, rivers, water courses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh water or marine life, and where any such pollution occurs, or has occurred, shall take prompt steps to control and if possible end it.[31]

In similar vein, s. 2 of the *Environmental Impact Assessment Act*[32] restricts the public and private sectors of the economy from undertaking or embarking on public or authorised projects or activities without prior consideration of the environmental impact of such projects. The oil companies are also enjoined to maintain their equipment and installations in good repair and condition. This is in order to prevent the escape or avoidable waste of petroleum and to minimize damage to the surface of the relevant area, trees, crops, buildings structures and other properties thereon.[33]

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[29] A. Ibidapo-Obe, "Criminal Liability for Damage Caused by Oil Pollution" in J.A. Omotola ed., *Environmental Laws in Nigeria, supra* note 4 at 247.

[30] Cap. 350, Laws of the Federation of Nigeria, 1990.

[31] See also s. 20 of the *Federal Environmental Protection Agency Act*, Cap. 131, Laws of the Federation of Nigeria 1990, which prohibit discharge of harmful quantities of hazardous substance into the air or upon land and waters of Nigeria or at the adjoining shorelines except where such discharge is permitted or authorised under any law in force in Nigeria.

[32] Decree (now Act) No. 86 of 1992.

It is not surprising that, despite what seems an elaborate legal regime on environmental protection under Nigerian law, environmental abuse and degradation is rampart in the Niger-Delta. There is little or no enforcement of those laws by statutory bodies, such as the Federal Environmental Protection Agency,[34] due to lack of courage, expertise and sometimes the funds. As pointed out by some observers:

> most state and local government institutions involved in environmental resource management lack funding, trained staff, technical expertise, adequate information, analytical capability and other pre-requisites for implementing comprehensive policies and programmes.[35]

Lack of enforcement has meant that oil companies disregard the laws with virtual impunity.

Besides, Nigerian environmental laws appear heavily tilted in favour of hortatory[36] and discretionary[37] approaches to governance as opposed to the mandatory and/ or command approach. Sanctions for noncompliance are hardly provided for in these statutes and regulations. The discretionary and voluntary nature of the provisions make compliance by the oil companies voluntary and consequently, the control of pollution is made difficult.[38] Even in cases where sanctions or penalties are stipulated for noncompliance, such as under the *Associated Gas Re-injection Regulations*, the sanctions are either not enforced by the government or the penalty is meagre. Consequently, oil companies would rather pay the prescribed penalty than to comply with the law itself. The companies adopt this attitude apparently in order to maximize profit and shareholder- value since the cost of complying with those laws far outweigh the prescribed fee or penalty for noncompliance. For example, the cost of re-injection of gas is considerably higher than the cost of flaring gas.[39]

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[33] *Supra* note 30, Regulation 36.

[34] See the *Federal Environmental Protection Agency Act, supra* note 31.

[35] Environmental Resources Managers Ltd., *supra* note 22 at 263

[36] See, for example, the *Petroleum (Drilling and Production) Regulations, 1969* made pursuant to the *Petroleum Act, 1969* particularly Regulations 25 and 36 thereof.

[37] See, for example, the *Associated Gas Re-injection Act*, Cap. 26, Laws of the Federation of Nigeria, 1990 which gives discretionary powers to the Minister designated thereunder to permit gas flaring. See also, the *Associated Gas Re-injection (Continued Flaring of Gas) Regulation, 1984.*

It also appears that the oil companies are motivated in their corporate activities almost exclusively by the state of their "financial balance sheets" and "the satisfaction of shareholders."[40] Little consideration is placed by the companies on the negative impact of their corporate activities in the communities in which they operate. Thus, the companies, apparently in an attempt to maximize corporate profits, have consistently neglected to replace or renovate their facilities especially the pipelines which were installed in the 1960s and 1970s. Studies have shown that oil spillages in Nigeria are often caused by equipment failure or malfunction.[41] Shell Petroleum Development Company Limited, for example, admits that "most of the facilities were constructed between the 1960s and early 1980s to the then prevailing standards" and that Shell "would not build them that way today."[42] Renovating or replacing those facilities would involve huge capital expenses. The use of corporate funds on such projects would necessarily affect corporate profits particularly in the short run and consequently, shareholder-value.

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[38] O. Akanle, *Pollution Control Regulation in the Nigerian Oil Industry* (Lagos: N.I.A.L.S.,1991) at 13.

[39] Y. Omoregbe, "Law and Investor Protection in the Nigerian Natural Gas Industry" (1996) 14:2 J.E.N.R.L. 179.

[40] O. A. Alegimenlen, "Issues in the Acquisition of Petroleum Development Technology for Third World States" (1991) 15:2 OPEC Rev. at 123.

The present state of Nigerian company law seem to aid the oil companies in the practice of corporate insensitivity or irresponsibility. The companies are under no duty to consider the interests of the environment and the host communities in carrying out their activities by the *corpus juris* of our company law. Simply put, companies in Nigeria do not owe a duty to the host communities, other than the common law duty of care, irrespective of how hazardous corporate activities might be to such host communities. For reasons not far fetched, the common law duty of care has proved completely inadequate to address the problems faced by the people of the Niger-delta from oil exploration and exploitation. For one thing, it is considerably difficult for a plaintiff to establish negligence on the part of the oil companies in oil spills related litigation[43] because of the acute lack of reliable scientific data and evidence on the harmful effects of oil related activities in Nigeria. Thus, the chances of successful litigation against the companies are considerably reduced.[44] Besides, even where such litigation is successful, it will not, by itself, prevent pollution from recurring.[45]

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[41] See C.N. Ifeadi & J.N. Nwankwo, "Critical Analysis of Oil Spill Incidents in Nigerian Petroleum Industry" in *The Petroleum Industry and the Nigerian Environment* (Lagos: Federal Ministry of Housing and Environment, 1987) 104 at 108-109. The authors concluded that 50% of oil spills in each of the recorded years were caused by equipment failure.

[42] See Shell International Petroleum Company's promotional pamphlet, *Developments in Nigeria* (London: March 1995.)

[43] See *Seismograph Service v. Mark* (1993), 7 N.W.L.R. (Part 304) 203.

What then must be done to prevent or at least reduce the environmental and human rights crisis in Nigeria's oil producing communities? The author shall attempt to offer solutions which would operate within Nigeria as well as solutions in relation to those countries where shareholders in oil companies doing business in Nigeria reside. Consequently, it shall be suggested that:

(1) the Nigerian company law statutory provisions and mechanisms on corporate social responsibility be strengthened so as to guarantee their efficacy and that a mandatory corporate social responsibility regime might be the antidote to the crisis. This addresses the problem from inside Nigeria;

(2) the shareholder proposals rule in the corporate laws of the countries of registration or *lex domicilii* of the multinational oil and gas companies be properly streamlined so as to afford the shareholders a veritable tool for ensuring that the companies are socially responsible to the society in which they operate. This addresses the problem from outside Nigeria.

VII. Organisation

The thesis is divided into four chapters. Chapter 1 examines, in general terms, the concept of corporate social responsibility in contemporary corporations law. It undertakes a brief review of the theories of corporation and the influence those theories have on corporations law. It thereafter examines the corporate social responsibility debate especially as espoused by the contractarian and communitarian theorists. The place of corporate social responsibility in the corporate laws of Canada and the United States is also examined. The chapter seeks to establish that the corporate governance norm is changing towards an increased recognition of outside interests. It posits, in a general way, a corporate governance model whereby directors owe justiciable fiduciary duties to non-shareholder groups. As importantly, this chapter provides the philosophical foundation for the legal reforms and strategies advocated in subsequent chapters.

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[44] See, for example, *Shell v. Otoko* (1990), 6 N.W.L.R. (Part 480) 148.

[45] P. D. Okonmah, *supra* note 4 at 46.

Chapter 2 explores the environmental and human rights crisis in Nigeria's oil and gas producing communities in greater detail. It contextualizes and situates the causal connection between oil and gas exploration/exploitation and the environmental and human rights violations in those communities. It concludes that an increased emphasis on corporate social responsibility is essential to improving the quality of life and enjoyment of human rights in Nigeria's oil and gas producing region.

Chapter 3 offers corporate law solutions to the crisis from the perspective of reform of Nigerian corporate law. First, the chapter advocates the strengthening of Nigerian company law statutory provisions related to corporate responsibility by companies operating in Nigeria. Second, it advocates a mandatory corporate social responsibility regime in the corporate laws of Nigeria as an important means of helping resolve the seemingly intractable situation in the country's oil producing communities. Such a legal regime should mandate and compel companies and their directors/managers to consider the interests of a clearly defined class of non-shareholders, such as the host communities, contemporaneously with those of the shareholders in corporate governance. Towards this end, I suggest in that chapter that company directors' fiduciary duties should be enlarged to include a duty owed to such non-shareholders who should, in turn, be accorded the legal right to sue the company and/directors to compel compliance with or for breach of that duty. This right is to be exercised within the framework of some standing rules so as to protect companies and directors from frivolous law suits.

Chapter 4 examines some mechanisms for ensuring global corporate responsibility within countries outside of Nigeria. Emphasis, in this regard, is placed on the role of the shareholders of multinational corporations doing business outside their countries of registration or *lex domicilii* in ensuring that the corporations are socially responsible in the foreign countries in which they operate. The chapter ends with an examination of the civil laws of the United States and Canada with a view to ascertaining whether corporations could be held liable thereunder for corporate irresponsibility as regards their complicity in human rights violations which occur outside the shores of those countries.

VIII. Terminology.

In this thesis, the following terms are used interchangeably and in the context used, they mean the same thing:

a. Oil and Gas Producing Communities / Oil Producing Communities / Niger-Delta.

b. Oil and Gas Companies / Oil Companies.

c. Government / Federal Government of Nigeria.

d. Company law / Corporations law / Corporate law.

e. Company(ies) Act / Corporations Act.

f. Corporate Social Responsibility / Corporate Responsibility.

VIV. Appendixes

The provisions of ss.299 - 313 (Part X) of the *Companies and Allied Matters Act* on the protection of the minority and the public against illegal or oppressive corporate conduct are attached herewith as Appendix A.

The Provisions of Chapters II and IV of the *Constitution of the Federal Republic of Nigeria, 1999* titled 'Fundamental Objectives and Directive Principles of State Policy' and 'Fundamental Rights' are also attached to this thesis as Appendixes B and C respectively.

CHAPTER 1

CORPORATE SOCIAL RESPONSIBILITY IN CONTEMPORARY CORPORATIONS LAW: AN OVERVIEW

I. Introduction

> The law does not say that there are to be no cakes and ale, but there are to be no cakes and ales except such as are required for the benefit of the company...Charity has no business to sit at board of directors qua charity. There is, however, a kind of charitable dealing which is for the interest of those who practice it, and to that extent and in that garb, ...charity may sit at the board, but for no other purpose[1]

Corporations, particularly those incorporated specifically to undertake business ventures, are in business with a view to making a profit. For a greater part of the 20th century and indeed since the publication in 1931 of an article on the subject by Adolph A. Berle,[2] the predominant assumption in legal circles has been that corporations exist solely for the benefit of the shareholders and that therefore "corporate law's objective is to develop legal structures that will maximize shareholder wealth."[3] Despite the dominance of this idea, other theories or idea of corporation have, over the years, been propounded by legal scholars, philosophers, and economists.[4] One such theory, which is the central theme of this Chapter, is the Corporate Social Responsibility theory[5]

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[1] Justice Bowen in *Hutton* v. *West Cork Railway Co.* (1883), 23 Ch.D 654 at 673. See also *Dodge* v. *Ford Motors Co.*, 204 Mich. 459 at 507 (1919) 170 N.W. 668 at 684 where the court said: " (a) business corporation is organised and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of the directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits or to the non-distribution of profits among stockholders in order to devote them to other purposes."

[2] See A. A. Berle, Jnr, "Corporate Powers as Powers in Trust" (1930-31), 44 Harvard L. Rev. 1049 at 1049 where he asserted that "all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears."

[3] D. Millon, "Communitarians, Contractarians, and the Crisis in Corporate Law" (1993) 50 Wash. & Lee L. Rev. 1373 at 1374.

Although these theories of the corporation are almost always in opposition to one another, they all seek to attain a common objective, to wit, the ascertainment of the normative value of corporate law. An understanding of these theories is necessary and indeed vital for a proper understanding and conceptualisation of corporate law. As one legal commentator has rightly observed

> (t)he various theories of the corporation that have enjoyed prominence since the 19th Century have influenced thinking about how the law should treat corporate activity. At any point in time, particular theories of the corporation are perceived to justify particular legal rules or, at a more general level, a particular approach to regulation of business activity.[6]

In effect, these theories have helped to shape how the law perceives a corporation and what the role of corporations should be in the society. Legal theories and corporate doctrine are therefore interdependent, each simultaneously influencing the other.[7]

As will become evident in this Chapter, each of these theories of the corporation have, at one time or the other, sought to impute to corporations law its own normative value and legal justification for such. These normative values have changed radically over time. The theories are therefore "fundamentally indeterminate"[8] and perhaps illusory. As illusory as these theories may seem, in recent times, two clear and ideologically opposed groups of theorists have become discernable. They are the "Shareholder Primacy" and the "Non-shareholder interests" groups.[9] So opposed are these two groups that it has been asserted that there is a "crisis in corporate law."[10].

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[4] These include the Fiction, Natural Entity, Grant or Concession, Aggregate and the Nexus-of-Contracts theories. Some of these theories are discussed briefly hereunder.

[5] See E. M. Dodd, JR., "For Whom are Corporate Managers Trustees?" (1931-32) 45 Harvard L. Rev. 1145.

[6] D. Millon, "Theories of the Corporation" (1990) Duke L. J. 201 at 204.

[7] *Ibid* at 204. He states further at the same page that "our ideas about what corporations are provide us with a critical perspective towards corporate doctrine, while our interpretation of the corporate doctrine reveals what appears to be essential or characteristic of corporations."

The unresolved question, and indeed a very fundamental one, is: what is the normative value of corporations law? In other words, what is or what should be the central theme or focus of corporations law? Put differently, should shareholder wealth maximization continue to be the dominant norm in corporate governance or should the interest of non-shareholders be taken into account by corporate managers? If so, what is or should be the appropriate balance between these two competing interests.?

This Chapter attempts to answer these questions. In doing so, it undertakes a review, albeit briefly, of some of the theories of corporation and the influence they have on corporate law. It examines, thereafter, the corporate social responsibility debate especially as espoused by the Contractarian and Communitarian theorists. The place of corporate social responsibility in the corporate laws of the United States and Canada is also examined. While making a case for corporate social responsibility, the chapter advocates a legal regime that mandates and compels corporate managers to consider the interests of non-shareholders contemporaneously with those of the shareholders in corporate governance. In advocating such legal regime, it is suggested that corporate directors' fiduciary duties should be enlarged to include a duty owed to non-shareholders such as employees and the corporations' host-communities and that these non-shareholders be accorded a legal right to sue the corporation and /or the directors to compel compliance with or for breach of such duty.

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[8] *Ibid* at 262.

[9] These groups are also referred to as the 'Contractarians' and the 'Communitarians' respectively.

[10] D. Millon, *supra* note 3 at 1377.

The fundamental goal of the chapter is to conceptualize the changing nature of the corporate governance norm and the underlying philosophical basis for that change while simultaneously providing a legal foundation for the arguments advanced later in the thesis.

II. Theories of the Corporation

a. The Fiction or Artificial Entity Theory

Savigny, a great philosopher of his time, is credited with beginning the scientific metaphysical consideration of the nature of corporate personality.[11] He considered the property rights of a corporation and concluded that, in law, corporate property belongs to the corporation and not the individuals who make up the corporation. Savigny then posed a question- "Who or what is the real owner of this property?" His answer was that corporate property belongs to a fictitious being. To him, this must be so because a cardinal attribute of ownership concept involves the possession of a Will by the owner. Since a corporation cannot be said to really possess a Will, it must, as a property owner, be a fictitious person.[12]

This theory which has found favour particularly in English corporate law jurisprudence is to the effect that upon incorporation, the corporation is legally cloaked with a separate personality, different and distinct from its incorporators. This personality, though fictitious and artificial, is treated by law as being able to engage in legal and business relationships in much the same way as a natural person.[13] The corporation can therefore enter into contracts and conduct business in its own name separate from that of the shareholders.

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[11] See A. W. Machen, Jr., "Corporate Personality" (1910-11) 24 Harvard L. Rev. 253 at 255.

[12] *Ibid* at 255. As Machen points out at 256, other philosophers, notably Brinz, raised objections to Savigny's theory. Corporate property they posited, is not owned by a fictitious person but owned by no person at all. To these philosophers, corporate property is not the property of a person but of a purpose.

Although this theory has long found judicial favour,[14] critics of the theory point out that only human beings can legitimately claim legal rights and obligations and that therefore, a corporation is not fictitious or artificial but should be regarded as a collective name for all the incorporators.[15]

b. The Concession or Grant Theory

This theory conceives of the corporation as a grant or concession from the State. The proponents of the theory posit that the corporation is only in existence and in business because of the permission or concession granted it by the State. Therefore, the State is at liberty to impose restrictions, through legislation, on corporate activity and behaviour and may indeed withdraw the corporate privilege if such restrictions are not complied with.[16] Relics of this theory, which apparently justify a regulatory legal regime in corporation law, can still be found in modern corporation law particularly in the British common law jurisdictions such as Canada and Nigeria.[17]

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[13] See F. Pollock, "Has the Common Law Received the Fiction Theory of Corporation?" (1911) 27 L.Q.R.219; and C.T. Carr, *The General Principles of the Law of Corporations* (London: Cambridge University Press, 1905) at 160-63 for detailed analysis of this theory.

[14] See *Trustees of Dartmouth College* v. *Woodward* (1819), 17 U.S.(4 Wheat) 518 at 636 where Chief Justice Marshall said: "A corporation is an artificial being, invisible, intangible, and existing only in the contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.... Among the most important are immortality, and, if the expression be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual." See also *Welton* v. *Saffery* (1897), A.C. 299, per Lord Halsbury L.C.at 305.

[15] See M. Radin, "The Endless Problem of Corporate Personality" 32 Colum. L. Rev. 643 at 665. See also A. W. Machen, *supra* note 11 at 257 where he points out that the word 'artificial' is not synonymous with the word 'fictitious'. He continued : "That which is artificial is real and not imaginary: an artificial lake is not an imaginary lake nor is an artificial waterfall a fictitious waterfall. So a corporation cannot be at the same time created by the State and fictitious. If a corporation is created, it is real, and therefore cannot be a purely fictitious body having no existence except in legal imagination. Moreover a corporation cannot possibly be imaginary or fictitious and also composed of natural persons. Neither in mathematics nor in philosophy nor in law can the sum of several actual, rational quantities produce an imaginary quantity."

Advocates of the theory further posit that since corporations come into being as a result of the positive act of the State, the privileges and benefits accruable therefrom should not benefit only the incorporators but must be employed for the public good. Corporate law must therefore address "the relationship between corporate activity and public welfare."[18] As shall be seen later in this chapter, this theory has, in modern times, been used as offering a legal justification for corporate social responsibility.

c. Natural Entity Theory

This theory, also known as the 'Realist Theory,' conceives of the corporation as a natural way of doing business. It posits that the corporation comes into being not by the positive act of the State but through the private initiatives of human beings, that is, the incorporators. Therefore, a corporation is not imaginary or fictitious, but real, not artificial but natural. The law does not create it but merely recognises and gives effect to its existence.[19]

In the wake of the economic depression in the United States of America in the early

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[16] R. W. Hamilton, *Corporations*, 4th ed. (St. Paul, Minn: West Publishing Co.,1997) 120.

[17] See, for example, ss. 5, 6, 7, 8, & 9 of the Alberta *Business Corporations Act,*1981, c.B-15 with amendments in force as of May 19, 1999.

[18] D. Millon, *supra* note 6 at 201.

[19] A. W. Machen, *supra* note 11 at 261-262.

1930s, which led to big corporations being criticised heavily for not being concerned about public welfare, E. Merrick Dodd seized upon this theory and advocated that corporate managers should not focus exclusively on shareholders interests but must also consider the interests of non-shareholders in making corporate decisions. In other words, that corporations should be socially responsible.[20]

However, this theory is flawed in that the attempts by its proponents to equate corporate personality with human personality is at best metaphysical and technical and ignores the legal reality that corporations have legal personality only because the law so stipulates.

d. The Aggregate Theory

The proponents of this theory, which is also known as the "Symbolist" or "Bracket" theory, perceive the corporation as an aggregate of its members. That is, the corporation is nothing more than the collective name for its members.[21] The corporation must therefore carry out its activities solely for the benefit of its members, that is, the shareholders. To these proponents, the central problem in corporate law is the dichotomy between the powers of those who manage the corporation and the protection of the interests of the shareholders. Corporate law, in order to address this problem, must regard and treat corporate managers as trustees for the shareholders. These trustees must act only for the interest of the shareholders and corporate law must insist on this. To this group of theorists, corporate management's decisions must be judged by asking whether "under all the circumstance, the result fairly protects the interest of the shareholders."[22]

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[20] E. M. Dodd, *supra* note 5. Through this article, Professor Dodd started a corporate ideal which is referred to today as Corporate Social Responsibility. That concept is the central theme of this thesis.

[21] See A. Berle & G. Means, "The Modern Corporation and Private Property" 131 n. 5 (1932). This idea of the corporation seems to negate or deny the separate personality principle.

The theory not only reduces the corporation to a purely private affair, it also rejects "any justification for legal regulation based on the idea that activities of large corporations affect in important ways a broad range of constituencies other than shareholders."[23]

The theory has been criticised as not only individualistic but also as ignoring the fact that the corporation is a useful legal concept precisely because it is regarded by common law both as a separate person and an association of its members.[24]

e. The Nexus-of-Contracts or Contractarian Theory

This theory, apparently founded on neo-classical economics, is an offshoot of the Aggregate theory.[25] It analyses the corporation as an economic concept and in doing so uses economic vocabulary and terms.[26] It views the relations between shareholders, managers and other participants in the corporate enterprise such as employees, suppliers and the public as similar to ordinary contracting between suppliers and buyers, and conceives of the corporation as a nexus-of-contracts between these various participants. It rejects the view that a corporation is a distinct and separate entity[27] and the notion that shareholders are owners of the corporation "preferring instead to describe shareholders as only one among the various suppliers of inputs, whose rights are determined by the inter-relation of the various contracts that define and constitute the corporate enterprise."[28] These various participants in the corporate enterprise freely contract in accordance with what is best in their interest.

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[22] *Ibid* at 275.

[23] D. Millon, *supra* note 6 at 224.

[24] See *Mayson, French & Ryan On Company Law*, 15th. ed. (London: Blackstone Press , 1998) at 162. See also Lord Summer in *Gas Lighting Improvement Co. Ltd.* v *Commissioners of Inland Revenue* (1923), A.C.723 at 741 where his Lordship said: "Between the investor, who participates as a shareholder, and the undertaking carried on, the law interposes another person, real though artificial, the company itself, and the business carried on is the business of that company, and the capital employed is its capital and not in either case the business or the capital of the shareholders ...the idea that (the company) is mere machinery for effecting the purposes of the shareholders is a layman's fallacy. It is a figure of speech, which cannot alter the legal aspect."

[25] It differs from the Aggregate theory in that it rejects the notion that shareholders are the owners of the corporation. Instead, it views the corporation as a nexus of contracts between the various participants in the corporate enterprise such as shareholders, managers, and employees.

[26] D. Millon, *supra* note 6 at 229.

Flowing from the notion that the corporation is nothing but a series of contractual relationships, advocates of this theory contend that the State must not impose mandatory rules on corporate activities as this would, in their view, be inconsistent with the freedom of contract of those involved in the corporate enterprise.[29] In effect, this theory which has been described as the dominant academic view, conceives of the corporation as "a web of ongoing contracts (explicit and implicit) between various real persons."[30] The fact that these contracts are ongoing mean that corporate law should not impose mandatory rules governing such contracts as the contracting parties' freedom of contract ought not to be encumbered. A legal commentator has asserted that this theory is the underlying and dominant principle in the United States corporate jurisprudence and hence its corporate law is mainly enabling and not regulatory in character.[31] Advocates of this theory argue that the normative value of corporate law is the provision of a standardized form of contract or precedent contract forms which participants in the corporate enterprise can utilise for the guidance of their relationship.[32]

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[27] See M. Bradley et al, "The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads" (2000) 42:2 Corp. Prac. Comm. 283 at 312.

[28] D. Millon, *supra* note 6 at 229. See also S. M. Bainbridge, "In Defence of the Shareholder Wealth Maximization Norm: A Reply to Professor Green" (1993) 50 Wash. & Lee L. Rev.1423 at 1427; F.H. Easterbrook & D.R. Fischel, "The Corporate Contract" (1989) 89 Colum. L. Rev. 1416; M. Jensen & W. Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure" (1975) 3 J. Fin. Econ.305; Butler, "The Contractual Theory of the Corporation" (1989) 11 Geo. Mason L. Rev. 99; D.R. Fischel, "The Corporate Governance Movement" (1982) 35 Vand. L. Rev. 1259, for detailed analysis of the nexus of contracts theory.

[29] See L. A. Bebchuk, "The Debate on Contractual Freedom in Corporate Law" (1989) 89 Colum. L. Rev. 1395.

[30] W. T. Allen, "Contracts and Communities in Corporation Law" (1993) 50 Wash. & Lee L. Rev. 1395 at 1400.

These theorists, often referred to as "contractarians", apparently assume that everyone dealing with the corporation has adequate knowledge about whatever transaction they enter into with the corporation and that they act rationally to maximize their wealth.[33] This assumption damages the potency of the theory. In real life, not all who deal with a corporation are necessarily aware of the nature and / or details of their transaction to be able to contract freely and rationally.

Besides, the practical application of this theory and the assumptions embedded therein to corporations law is fraught with difficulties. This is so partly because contract law is inappropriate for handling constitutional questions which often arise in corporate law.[34] Again, this theory ignores the fact that there are different categories of persons in each of the constituent groups making up the corporate enterprise.[35] How, for example, are these various categories of participants to contract with the corporation? It is obvious that the practical application of this contract theory not only poses some difficulties but negotiating these constituent contracts may lead to very high costs. This in turn has a negative impact on the finances of the corporation thereby affecting shareholders' wealth. The theory is therefore self-contradictory. As we shall see shortly, proponents of this theory posit that the sole aim of corporate governance is shareholders' wealth maximization. Yet, by relying exclusively on contracts, the theory adds to the costs of running the corporation thereby limiting the ability of the corporation to maximize shareholders' wealth.

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[31] *Ibid* at 1400.

[32] See S. M. Bainbridge, *supra* note 28 at 1428.

[33] See R. W. Hamilton, *supra* note 16 at 122.

[34] See Mayson, French, & Ryan , *supra* note 24 at 167.

f. Influence of the Theories on Corporations Law

A cursory look at contemporary corporate law statutes shows that while these theories have had a tremendous impact on corporate law over time, contemporary corporate law statutes do not support or imbibe a single ideological position or theory. There seem a combination of these theories in modern corporate law statutes. In Canada, for example, it has been argued that the Canadian *Business Corporations Act* (hereinafter the "CBCA") embraces the fiction theory.[36] Amongst other reasons offered in support of this view are the facts that the CBCA (1) empowers directors to revive a dissolved corporation,[37] (2) permits the incorporation of a company without shareholders,[38] and (3) allows an existing corporation to incorporate another.[39] With due respect to the learned authors, it does seem that the CBCA also embraces the natural or real entity theory. This is evident in s.15 thereof which confers on the corporation all the powers of a natural person. Further support for this view can be found in decisions of Canadian courts which have held that certain provisions of the *Canadian Charter of Rights and Freedoms* applies to corporate bodies.[40]

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[35] See E. W. Orts, "The Complexity and Legitimacy of Corporate Law" (1993) 50 Wash. & Lee L. Rev. 1565 at 1577. Professor Orts also attacks economic theories of the firm, of which the Nexus-of-Contracts theory occupies a prime position, as tending only to focus on economic and financial relationships involved in the corporation ignoring in the process other relationships. As he points out at 1615 "a corporation is not merely a nexus of contracts among individuals, it involves relationships of power, control, and discretionary authority."

[36] See J. S. Ziegel, R.T. Daniels, & J. G. MacIntosh, eds., *Cases and Materials on Partnership and Canadian Business Corporations*, 3rd ed. Vol. 1 (Toronto : Carswell, 1994) at 139.

III. Corporate Governance Objective: The Debate

Before examining the corporate governance debate, it is perhaps appropriate to ascribe some meaning to the terms 'corporate social responsibility' and 'corporate governance' as used in this thesis. Often times, corporate social responsibility is equated with corporate philanthropy. However, that term, as used herein, has a broader meaning. It includes attending to the consequences of the daily business operations of the corporation, and corporate ethics in the conduct of corporate business.

The term 'corporate governance' has been traditionally viewed as the relationship between those who provide the company's capital and those who manage the company's affairs.[41] This notion appears to be too narrow. Corporate governance involves not just the relationship between the company and those who provide the capital for its business but also involves the relationships between the company and all other constituents with whom it comes into contact in the pursuit of its business. Such other constituents will necessarily include its employees, creditors, suppliers, host communities, customers and the public. Therefore, the term "also implicates how the various constituencies that define the business enterprise serve, and are served by, the corporation."[42] In essence, corporate governance involves a contextualization and scrutiny of the purposes of the corporation and its accountability to each of the relevant corporate constituencies.[43]

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[37] See s. 209 of the CBCA.

[38] See ss. 6, 8, and Forms 1 & 2 CBCA.

[39] See s. 5 (2) CBCA.

[40] See, for example, *RJR-MacDonald Inc.* v. *Canada*, [1995] 3 S. C. R. 199 (S.C.C.); *Hunter* v. *Southam Inc.*,[1984] 2 S. C. R. 145 (S.C.C.).

As pointed out earlier, in modern times, two distinct but fiercely opposed groups of theorists of the corporation seem clearly discernable. They are what I will call "the shareholder-primacy theorists", otherwise called the 'Contractarians,' and "the non-shareholder interests theorists", otherwise called the 'Communitarians.' These groups of theorists are strongly opposed as to what the normative value or role of corporate law is or should be.

a. The Contractarians : Argument Against Corporate Social Responsibility

The contractarians, using some economic imperatives and norms, view the corporation as being solely in existence for the benefit of the shareholders. Therefore, corporate managers must consider only the interests of the shareholders in making management decisions. This concept of shareholder wealth maximization denies the interests of non-shareholders even if those interests are adversely affected by its pursuit.[44] The contractarians insist that the question corporate managers must always ask themselves is : Will a particular corporate decision or activity add value to the corporation and therefore increase and indeed maximize the wealth of the shareholders? To these theorists, the objective of corporate law is to develop legal rules and structures that ensure maximization of shareholders' wealth.

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[41] See, for example, A. Shleifer & R. W. Vishny, "A Survey of Corporate Governance" (1997) 52 J. Fin. 737; O. D. Hart, "Corporate Governance: Some Theory and Implications" (1995) 105 Econ. J. 678.

[42] M. Bradley et al, *supra* note 27 at 287.

[43] *Ibid* at 287.

Professor Romano, a foremost contractarian theorist, posits that:

> (m)odern corporation codes tend to be enabling rather than mandatory statutes: they are standard form contracts specifying the rights and obligations of managers and shareholders, which can often be altered by private agreement to suit the circumstances of particular firms. The enabling approach is a function of the contractual nature of the corporation.[45]

Corporate law must therefore not impose mandatory rules since doing so will infringe the rights of the parties to contract freely.[46]As we have seen, to these theorists the relationship between the various participants in the corporate enterprise must be left to those parties themselves to regulate through contracts freely entered into by them.[47]

The contractarian notion of the corporation have far reaching implications in corporations law. Their view not only pierces the corporate veil or entity but disregards it and instead looks upon the shareholders as the corporation itself. Hence contractarians argue that corporate taxes are paid not by the corporation but by the shareholders in the form of double taxation. In the same vein, "corporations themselves do not pollute; rather, employees of the corporations pollute, corporations are not liquidated; rather, bondholders are not willing to finance the continuation of the firm's activities."[48]

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[44] D. Millon, *supra* note 3 at 1374 -78.

[45] R. Romano, *The Genius of American Corporate Law* (Washington: AEI Press, 1993) at 85. See also, R. Romano, "Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws " (1989) 89 Columbia L. Rev. 1599.

[46] D. Millon, *supra* note 3 at 1377-78.

[47] See E. Ribstein, "The Mandatory Nature of the ALI Code" (1993) 61 Geo. Wash. L. Rev. 984. It is noteworthy that among contractarians, there is a divergence of opinion as to whether corporate law should regulate relationships in the corporate enterprise and if so, the permissible or tolerable level of such regulation. Writers such as E. Ribstein maintain that corporate law must not, under any guise, stipulate regulatory rules that have the effect of interfering with private ordering through contract. Other authors, notably F.H. Easterbrook & D.R. Fischel, are willing to accommodate some mandatory corporate law rules if only to checkmate market failure. See Easterbrook & Fischel, *The Economic Structure of Corporate Law* (Cambridge, Mass.: Harvard University Press,1996).

This theory is apparently premised on the "Fiduciary and Principal - Agent paradigms."[49] Relying on these paradigms, contractarians argue that corporate managers are employees of the shareholders (owners) of the corporation and that their responsibility is to conduct business only for the maximum benefit of those owners while "conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom."[50] To contractarians, other constituencies in the corporate enterprise such as employees, suppliers, creditors, and host communities, must in order to protect their interests, freely negotiate the terms of their relationships with the corporation through contract. As we shall see later, the reliance on contract mechanism as a means of ordering corporate relationships does the greatest damage to the potency of this theory. In any event, while the contractarian theory might admittedly have some potency in the developed economies, its place in the corporate law jurisprudence and philosophy of the poor and developing economies is very doubtful. To this I shall return in due course.

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[48] M. Bradley et al, *supra* note 27 at 312.

[49] R. M. Green, "Shareholders as Stockholders : Changing Metaphors of Corporate Governance" (1993) 50 Wash. & Lee L. Rev.1409 at 1413.

[50] M. Freidman, "The Social Responsibility of Business is to Increase its Profits" *N.Y. Times Magazine*, (13 September, 1970) at 33. It seems clear from the quoted words that Freidman concedes that Corporate law can indeed stipulate regulatory rules for corporate governance. Contra E. Ribstein, *supra* note 47. Freidman seem however to go a step further than most contractarians because of his view that it amounts to a form of taxation and embezzlement for corporate managers to divert corporate resources to other causes (whether worthy or not) other than those of the shareholders.

b. The Communitarians : The Counter Argument

> Public opinion, which ultimately makes law, has made and is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function, that this view has already had some effect upon legal theory and that it is likely to have a greatly increased effect upon the latter in the near future.... A sense of social responsibility towards employees, consumers and the general public may thus come to be regarded as the appropriate attitude to be adopted by those who are engaged in business, with the result that those who own businesses and are free to do what they like may increasingly adopt such an attitude.[51]

As evident from the analysis above, shareholders wealth maximization has for long been the dominant norm in corporate governance. As far back as 1883, law courts were already giving judicial vent to this norm.[52] Despite this, however, a counter argument has been advanced that corporate managers ought to be able to consider the interests of non-shareholders in making corporate decisions. In no small measure, the pioneering works of Professor E. Merrick Dodd[53] have helped shape this counter argument. Dodd believed that the law permits and encourages business, not because it is a source of profit for its owners, but primarily because it is of service to the community. Therefore, where there is incompatibility between " unlimited private profit" and "adequate service" to the community, " the claim of those engaged therein that the business belongs to them in an unqualified sense and can be pursued in such manner as they choose need not be accepted by the legislature."[54] He justified a corporate law regulatory regime and posited that while regulations imposed in the interest of employees, consumers and others may increasingly limit the methods which corporate managers may employ in seeking profits for their stockholders, such regulations do not necessarily affect "the proposition that the sole function of such managers is to work for the best interests of the stockholders as their employers or beneficiaries."

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[51] E. M. Dodd, *supra* note 5 at 1148 and 1160.

[52] *Supra* note 1.

[53] *Supra* note 5.

Prophetically, Dodd asserted that a change in public opinion towards corporate social responsibility then being experienced in the United States of America would naturally have some effect on the attitude of those who manage business[55]and concluded that :

> Recent economic events suggest that the day may not be far distant when public opinion will demand a much greater degree of protection to the worker. There is a widespread and growing feeling that industry owes to its employees not merely the negative duties of refraining from overworking or injuring them, but the affirmative duty of providing them as far as possible with economic security.[56]

The days envisioned by Dodd are indeed here. All over the world, legal, moral and ethical issues relating to corporate social responsibility to the society at large, have for some time dominated legal and social discourse.[57] The dominance of the shareholders wealth maximization norm in corporate governance is being seriously questioned if not threatened. The issue is, should corporate law statutes empower corporate managers to consider the interests of non-shareholders in making management decisions?

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[54] *Supra* note 5 at 1149.

[55] *Supra* note 5 at 1153.

[56] *Supra* note 5 at 1151. Interestingly, Professor Dodd at 1160 relied on the Natural Entity Theory as providing a basis for his Corporate Social Responsibility concept.

[57] In the United States, for example, this question gained notoriety in the 1980s with the upsurge in hostile take-over bids. These bids exposed the inherent dangers in the contractarian idea of shareholder wealth maximization. See D. Millon, *supra* note 3 at 1375 where he points out that: " (i)n particular, there arose a widespread perception that, however beneficial they might be for shareholders, hostile takeovers imposed extensive, uncompensated costs on various nonshareholder constituencies. Workers lost jobs and other business relationships were disrupted, and local communities suffered further ripple effects, sometimes severe, from plant closings." Talisman Corporation's activities in the Sudan and its relationship with the dictatorial regime in that country raised the same issue in Canada while in Nigeria, the role played by oil and gas companies in human rights violations in the oil and gas producing communities in the Niger-Delta region of

It is an incontestable fact that corporations are in business to make a profit. It is also incontestable that in the pursuit of the profit motive, the corporation comes into different relationships with other constituencies and may in that process adversely affect the interest of those other constituencies. As shall be argued subsequently, corporate managers must not only be empowered by corporate law statutes, but should be mandated and compelled by same to consider the interests of other constituencies in making management decisions particularly in situations where the strict pursuit of the shareholder wealth maximization norm will adversely affect those other interests. In effect, this thesis advocates a mandatory regulatory regime in corporate governance.

The communitarians, placing emphasis on the social effect of corporate activity, view the corporation as being more than just a nexus of contracts. It is a powerful institution "whose conduct has substantial public implications."[58] In essence, it is an entity, who, like a natural person is capable of doing both harm and good. Therefore, its activities must be held in check by legal rules[59] and legal rules must regulate and structure relations among all participants in the corporate enterprise, be they shareholders, employees, suppliers, or the community at large. Communitarians believe, as does this writer, that corporate law must

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the country have led to a clamour for corporate social responsibility.

[58] D. Millon, *supra* note 3 at 1379.

[59] M. Bradley & C. A. Schipani, "The Relevance of the Duty of Care Standard in Corporate Governance" (1989) 75 Iowa L. Rev.1

intervene to cushion the harmful effect of shareholder wealth maximization pursuit on non-shareholders.[60] Being doubtful of the practical efficacy and utility of the contract mechanism for the protection of non-shareholders, these theorists advocate that corporate law must stipulate rules (some of which may be mandatory) allowing corporate managers to consider the interests of non-shareholders along with those of shareholders. While most communitarian theorists appear content with this proposition, a leading academic communitarian theorist has suggested that in cases in which certain kinds of serious inconveniences or harms threaten the interests of other stakeholders, the interests of the shareholders "might be explicitly subordinated" to those other interests.[61]

To communitarians, the society confers, through the instrumentality of law, an entity status on the corporation once incorporated. The corporation enjoys a limited liability and constitutional protections afforded it by the society. As consideration for these rights and privileges, the corporation must be socially responsible. That is the *quid pro quo* the society exacts from the corporation for granting it such special privilege and rights.[62]

c. Ideological Differences

The ideological difference between the two schools of thought lie in their view of the society and how human beings should conduct their affairs. On the one hand, the contractarians rely on freedom of contract principle and posit that people must be allowed freely to order their relations without any interference from the society as represented by law.

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[60] *Supra* note 3 at 1378.

[61] R. M. Green, *supra* note 49 at 1419.

[62] See T.L. Hazen, "The Corporate Persona, Contract (and market) Failure, and Moral Values" (1991) 69 N.C.L. Rev. 273.

On the other hand, the communitarians view the corporation as part of the society whose activities affect, in varying degrees, other constituencies in the corporate enterprise other than shareholders. Therefore, in order to strike a balance between the pursuit of shareholder wealth maximization and the interests of non-shareholders, corporate law must intervene and stipulate rules regulating corporate governance. Simply put, while contractarianism is rooted in utilitarian assumptions and methodological individualism, communitarianism finds its roots in humanism and methodological holism.[63]

d. A Critique of the Contractarian Theory

Much of the premise upon which the shareholders wealth maximization norm is based seem questionable and in some instances unjustifiable. How, for example, are the various constituencies to contract between themselves? What mechanisms or strategies are they to employ in negotiating and entering into these contracts? Without providing answers to these and similar questions, contractarian theorists assume that "feasible contracting strategies exist"which non-shareholders can employ in order to protect their interests.[64] It is beyond contest that it is impossible for human beings to foresee every conceivable danger that might befall them. How then are non-shareholders to foresee the various kinds of harm that could arise from the pursuit of the shareholders wealth maximization norm and therefore contract to protect their interests? There is no way the employees of a corporation, for example, can foresee a hostile take-over and therefore contract before hand to protect themselves from the harmful effects that might result therefrom.

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[63] A. Wagner, "Communitarianism: A new Paradigm of Socioeconomic Analysis" (1995) 24 J. Socio-Econ. 593 at 598.

[64] D. Millon, *supra* note 3 at 1378.

Perhaps more importantly, most employees do not have the requisite market power to bargain for such contract terms. The contract mechanism in the contractarian view of the corporation can therefore not be relied upon to take care of negative externalities that are likely to arise from corporate activities.

Again, contractarians assume that everyone in the non-shareholder constituency has the resources to contract freely. But as one commentator has observed, "(t)he market alone cannot adequately fulfil basic human needs for everyone because many people lack the resources to participate effectively in the market."[65] Admittedly, while the contractarian theory has some potency in the developed economies where literacy level is very high, it is practically not helpful in poor and developing economies where there is widespread illiteracy. How are such illiterate communities to contract to protect their environment, for example, which may be polluted as a result of a relentless pursuit of shareholders wealth maximization? Scenarios such as the above makes glaring the deficiency in the contractarian theory.

As pointed out earlier, the contractarians rely heavily on the Fiduciary and Principal-Agency paradigms as offering a normative basis for the shareholders wealth maximization concept. However, these paradigms do not reflect the reality in corporate law. Contractarian theorists seem to have realised this hence they tend to disregard the separate personality concept. The question is, to whom do the directors or corporate managers owe a fiduciary duty? While contractarian theorists posit that the fiduciary duty is owed to the shareholders, it is clear that, applying the separate personality principle which is the very foundation of corporate law, that duty is owed not to the shareholders but to the corporation itself.[66] The use of the Principal-Agency paradigm does a far greater harm to the potency of this theory. It reveals its deficiency and incongruity with the fundamental norm in corporate law, that is, the limited liability concept. This becomes more evident when a corporation is involved in a tortious or criminal act. Indeed, in such cases, the fallacy of the principal-agency paradigm become appallingly plain. Perhaps, a brief illustration will surfice. Corporate law is based on two fundamental principles or concepts. These are the separate personality and limited liability concepts. A corporation has a personality separate and distinct from its shareholders.[67] The shareholders in turn have limited liability. Therefore, if, as believed by contractarian theorists, corporate managers are agents of the shareholders (that is the Principals) it follows that ordinary agency law will guide the relationship between corporate managers and shareholders. That being so, shareholders will be liable vicariously for the torts committed by managers and indeed the corporation since the corporation acts through the managers. This result will clearly be incompatible with the concepts of separate personality and limited liability.

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[65] D. Millon, *supra* note 3 at 1383.

Although other reasons have been advanced as justification for the primacy of the shareholders wealth maximization norm in corporate law,[68] these reasons are flawed because the theory itself on which those reasons are based, takes a very narrow view of the corporation as being only a nexus-of-contracts without a separate existence of its own. The corporation is much more than that. It has a personality separate and distinct from its shareholders. It is a social institution as well.

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[66] See E.M. Dodd, *supra* note 5 at 1163; R. M. Green, *supra* note 49 at 1413. See also s. 117(7) of the Alberta *Business Corporations Act* as well as s. 279(1) of the Nigerian *Companies and Allied Matters Act*, Cap. 59, Laws of the Federation of Nigeria, 1990.

[67] See *Salomon* v. *Salomon*, [1897] A. C. 22 (H.L).

[68] For example, O. E. Williamson, in his book - *The Economic Institutions of Capitalism* (New York: Free Press, 1985) 304 -305 argues for the retention of the shareholder wealth maximization norm as the centre-piece of corporations law because, according to him, other than the special duties owed the shareholders by corporate managers, shareholders are among the least protected of corporate constituencies. See Professor R.

IV. Corporate Governance Structure: A New Approach

Professor Dodd had predicted in 1932 that a change in public opinion towards social responsibility would naturally have some impact on those who manage business and that thereafter,

> a sense of social responsibility towards employees, consumers, and the general public may thus come to be regarded as the appropriate attitude to be adopted by those who are engaged in business.[69]

This prediction has not only come true but corporate managers the world over now seem to have a change of attitude towards corporate social responsibility. Corporations are now more willing, without any form of legal compulsion, to adopt the social responsibility norm as a guide in conducting business and, as noted later in this thesis, subscribe to codes of conduct. An increasingly growing perception is that the corporation serves two purposes, that is, profit making and social service. It must therefore be structured and run with a view to fulfilling these purposes.

M. Green, *supra* note 49 at 1418 for a critique of this argument. In reality, however, shareholders are better protected than other corporate constituencies. For one thing, easy transferability of shares gives them considerable latitude and protection. Again, shareholders have enormous powers both under corporate law statutes and the corporate constitutions, that is, Articles of Association, which they can utilise for the protection of their interests. They can remove the directors at general meetings. They can also restrict the powers of the directors . See ss. 104 (1), 126 - 140 of the Alberta *Business Corporations Act* for the general powers of the shareholders. Indeed, in some countries such as the United Kingdom, management powers are statutorily vested in the shareholders although in practice, shareholders delegate those powers to the managers.

[69] E. M. Dodd, *supra* note 5 at 1160.

Modern corporate law also more commonly contains statutes with provisions enabling corporate managers to consider the interests of non-shareholders in discharging their duties to the corporation.[70] This in itself represents a shift towards corporate social responsibility. This shift, though commendable, is not profound enough. It is suggested that corporate law must move away further from the narrow minded shareholder- wealth maximization primacy concept to a regime that mandates and compels corporate managers to consider the interests of non-shareholders along or contemporaneously with those of the shareholders. In doing so, corporate law must extend the ambit of the fiduciary obligations of the directors to include obligations to non-shareholders.[71] This view becomes the more compelling and indeed irresistible in situations where the pursuit of shareholders wealth maximization is likely to endanger the interests of other constituencies. As aptly pointed out by a leading advocate of corporate social responsibility, if constituency statutes become more representative of the law in this area, it "may represent the beginning of a multi-fiduciary approach. Eventually, we would expect the elaboration of a body of law establishing a state of varied priorities for corporate management. Within this framework, shareholders would be one stakeholder group among others."[72]

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[70] See, s. 117(1)(a) & (4) of the Alberta *Business Corporations Act*, and s. 279(4) of the *Companies and Allied Matters Act*, Cap. 59, Laws of the Federation of Nigeria, 1990. The effects of these statutory provisions are discussed later in this chapter. Admittedly though, Corporate law consists of three different kinds of rules viz, mandatory, permissive or optional, and enabling rules. Much of the debate about corporate social responsibility has centered on whether corporate law should impose mandatory rules in relation to corporate governance. In this debate, the contending parties have sought to place premium on these different rules. For example, the contractarian theorists emphasize the enabling character of corporate law. See, R. Romano, "Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Law" (1989) 89 Colum. L. Rev. 1599.

[71] R. M. Green, *supra* note 49 at 1419 proposes two models for restructuring managers fiduciary duties - (a) multi-fiduciary obligation to both shareholders and non-shareholders, and (b) managers be allowed to consider their own ethical preferences. See however, S. M. Bainbridge, *supra* note 28 for a critique of Professor Green's proposals.

The fear has been expressed that such expansion of managerial discretion may lead to managerial abuse. As observed by some writers, rather than balance the interests of all constituencies affected by corporate activities, managers may be tempted by this discretion to pursue their self-interest at the expense of the interests of others and that therefore, responsibility to all stakeholder groups may effectively mean accountability to none.[73]

This fear has however been allayed by corporate law itself as shareholders wield enormous power of control over corporate managers. Besides, managers are ultimately responsible to the shareholders and shareholders have the powers to remove erring or non-performing managers. It need also be added that, in practice, most corporate managers are themselves shareholders in the corporation. This minimizes, if not eliminate, the potential for such managerial abuse of discretion.

a. Judicial and Legislative Attitudes

Arguments proffered by proponents of corporate social responsibility have had profound effect on the law and rules relating to corporate governance. In the United States, for example, several judicial decisions indicate that the business judgment rules have been expanded to include social responsibility. In *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.*,[74] the court held that "a board may have regard for various constituencies in discharging its responsibilities." Similarly, in *Unocal Corporation v. Mesa Petroleum Co,*[75] the court held that directors, in cases involving hostile take-over bids, may consider, among other factors, effect of such take-over on "creditors, customers, employees, and perhaps even the community generally."

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[72] *Ibid* at 1419. While conceding that shareholders would normally in such a regime be regarded as *primus interpares*, Professor Green advocates at 1419 that "their interests might be explicitly subordinated in cases in which certain kinds of serious inconveniences or harms threaten other constituencies."

[73] M. Bradley et al, *supra* note 27 at 305.

[74] 506 A. 2d 173, 182 (Del. 1986).

Commendable as these decisions may be, they do not go far enough. This is because of the caveat placed on directors' powers therein. Those same decisions require that measures taken for the benefit of non-shareholders should produce "some rationally related benefit accruing to the shareholders."[76] This caveat may, at times, amount to an unnecessary clog on the directors' discretion. Directors should be able to consider the interests of non-shareholders even if the shareholders will not benefit therefrom[77] provided the shareholders are not unfairly or unduly harmed. In any event, corporate acts beneficial to non-shareholders may ultimately translate into some form of gain for the corporation or the shareholders. That is, such acts may lead to increase in the public goodwill for the corporation which in turn leads to profits in one form or the order for the corporation and its shareholders. For these reasons, it is suggested that the view taken by the United States Power Commission in the case of *United Gas Pipeline Co.*[78] is preferable. There, the Commission allowed a contribution made by a company to a non-shareholder interest on the ground that "corporations have an obligation to the communities in which they are located and they are expected to recognize this obligation."[79]

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[75] 493 A. 2d 946 955 (Del. 1985).

[76] *Revlon Inc.* v. *MacAndrews & Forbes Holdings Inc., supra* note 74 at 176. A similar view was taken by the court in *Union Pacific Railway Co.* v. *Trustees, Inc., 8 Utah 2d 101,329 P.2d 398 (1958)* where it was held at 402 that actions beneficial to non-shareholders can be undertaken by directors "if they appear reasonably designed to assure a present or foreseeable future benefit to the corporation."

[77] See the American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations, Proposed Final Draft* (Philadelphia: American Law Institute - ABA, 1992) at 69.

[78] 31 F.P.C 1180 (1964).

More than half of the States in the United States have enacted statutes which permit (not require) directors to consider the interests of non-shareholders.[80] Again, while this development is commendable, it does not represent an appreciable shift from the shareholder primacy concept. Those statutes do not adequately protect the interests of non-shareholders.[81] The statutes do not impose an obligation or duty on corporate directors to consider non-shareholder interests and, like the caselaw authorities, majority of these statutes require that directors can only act for the benefit of non-shareholders *while considering the best interest of the corporation*. For example, the Minnesota statute provides as follows:

> In discharging the duties of the position of director, *a director may, in considering the best interests of the corporation,* consider the interests of the corporation's employees, customers, and creditors, the economy of the state and the nation, community and societal considerations, and the long-term as well as short-term interests of the corporation and its shareholders including the possibility that these interests may be best served by the continued independence of the corporation.[82] (Emphasis added.)

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[79] *Ibid* at 1189. The use of the word 'obligation' is particularly instructive. That word connotes a duty.

[80] See J. A. Springer, "Corporate Law Corporate Constituency Statutes: Hollow Hopes and False Fears" (1999) Ann. Surv. Am. L. 85 where he states: "Since 1983, thirty States have enacted legislation permitting corporate directors to consider the interests of employees and other groups in addition to shareholders when making decisions." Note however that the state of Nebraska repealed its constituency statute in 1995.

[81] See K. Van Wezel Stone, "Employees as Stakeholders under State Nonshareholder Constituency Statutes" (1991) 21 Stetson L.Rev. 45.

[82] Minn. Stat. Ann. 302A.251 (5) (West Supp. 1993).

These statutes, with a few exceptions,[83] require that the impact of the director's action on other constituencies must bear a relationship with "the best interests of the corporation." In economic terms, 'the best interest of the corporation' is usually judged or measured by corporate profit and shareholder gain.

The American Law Institute suggests a legal regime under which a corporation shall have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain and that :

> (e)ven if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business:
> (1) is obliged, to the same extent as a natural person, to act within the boundaries set by law,
> (2) may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and
> (3) may devote a reasonable amount of resources to the public welfare, humanitarian, educational, and philanthropic purposes.[84]

Two things need be noted about these proposals. First, they do not in themselves impose or seek to impose any obligations or liabilities on corporate directors and officials as they merely speak of the corporation. Second, the proposals take as a basic proposition that a business corporation should have as its objectives the conduct of business "with a view to enhancing corporate profit and shareholder gain."[85] It is difficult to see how these proposals can be effective in the absence of an imposition of obligations or duties on corporate directors and officials to ensure compliance with them. Since the obligations are addressed to the corporation only, there ought to be a corresponding right accorded the non-shareholders recognised in those proposals to sue the corporation for breach of same. Again, the economic proposition (that is, corporate profit and shareholder- gain) on which the proposals are based seem to ignore the fact that corporations in the modern world are more than mere economic institutions. They are social institutions as well.[86] As social institutions, corporations must consider the social impact of their activities on non-shareholders and corporate law must insist on this by providing the legal framework within which corporations are to do so. In any event, the terms 'shareholder- gain' and 'profit maximization' as used in the context of corporate governance are at best confusing. As one learned author has aptly pointed out, these terms "cannot be taken to mean that management must conduct the corporation's business so as to maximize each short-run opportunity for profit without regard to more fundamental implications for the corporation's future."[87] Thus it has been suggested that 'profit orientation' rather than 'profit maximization' is a more useful term to describe corporate management objective.[88]

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[83] See, for example, s. 23-1-35-1(f) of the Indiana Code which provides: "In making such determination, directors are not required to consider the effects of a proposed corporate action on any particular group or interest as a dominant or controlling factor."

[84] *Supra* note 77 at 69.

[85] *Supra* note 77 at 70 - 71.

The position in Canada appears to be slightly better. The *Canada Business Corporation Act*, for example, allows the incorporation of a corporation without shareholders.[89] This clearly defeats the contractarian idea of the shareholder as being the primary focus of corporate activity. Although s.117(1) of the Alberta *Business Corporations Act* (hereinafter "the ABCA") requires directors to "act honestly and in good faith with a view to the best interests of the corporation," by subsection 4 of that section, it allows directors elected or appointed "by the holders of a class or series of shares or by employees or creditors or a class of employees or creditors" to give "special, but not exclusive, consideration to the interests of those who elected or appointed him." This represents a substantial departure from the shareholder primacy concept. It is submitted that this section of the ABCA, by using the word "special," permits a director so elected or appointed to place the interests of those electing or appointing him over and above those of the shareholders. In effect, under the ABCA, 'the best interests of the company' is not necessarily co-terminous or synonymous with shareholder gain. Under that Act, 'best interests of the corporation' can also be determined by considering the interests of those stipulated non-shareholder constituencies.

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[86] *Supra* note 77 at 72.

[87] P. I. Blumberg, *Corporate Responsibility in a Changing Society: Essays on Corporate Social Responsibility* (Boston: Boston University School of Law, 1972) 7.

[88] *Ibid* at 7.

[89] CBCA, ss. 6, 8, and Forms 1 & 2. The CBCA position would seem to encourage the incorporation of 'shelf companies.'

The Nigerian law presents an interesting dimension to the corporate social responsibility concept. This is so, not only because some statutory enactments[90] encompass the concept, but also because the *Constitution*[91] of the country seems actively to support and encourage it. The place of the corporate social responsibility concept under the laws of Nigeria is discussed in Chapter 3 of this thesis. However, it need be pointed out at this stage that s. 279(4) of the *Companies and Allied Matters Act*[92] (hereinafter "the CAMA") provide that the matters to which the director of a company is to have regard in the performance of his functions and duties "include the interests of the company's employees in general, as well as the interests of its members." As I shall argue in Chapter 3, the Nigerian law takes too narrow a position in respect of the corporate social responsibility concept. Consequently, that concept is treated with disdain by companies in Nigeria.

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[90] See, for example, *Education Tax Act*.

[91] *Constitution of the Federal Republic of Nigeria, 1999*.

[92] Cap. 59, Laws of the Federation of Nigeria, 1990. The *Companies Act* of 1968 which was replaced by the CAMA did not contain a similar provision as s. 279 (4). That subsection, however, is a replica of section 309 of the United Kingdom *Companies Act, 1985*.

In spite of the unsatisfactory state of corporate law statutes in the area of corporate social responsibility, the courts, particularly those in the British Commonwealth, have progressively imposed an obligation or duty on corporate directors in relation to creditors. Those courts, in rare instances of judicial activism, have held that directors are under a duty to consider the interests of creditors especially in relation to insolvency.[93] Perhaps, Lord Templeman's words in *Winkworth* v. *Edward Baron Development Co. Ltd.*[94] best illustrate this judicial attitude. In that case, His Lordship stated thus:

> A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of directors themselves to the prejudice of the creditors.

Corporate action taken in breach of such duty may be declared void or vitiated by the court.[95] The rational for such judicial extension of directors' duties seem to be the need to adequately protect the creditors by ensuring that their interests are not unnecessarily adversely affected by managerial decisions. This rationale finds support in the fact that at the point of insolvency, creditors' interests in the corporation cannot, by whatever standards those interests are measured, be regarded as trivial.[96] Only the creditors at that point still have a meaningful stake in the assets of the corporation.[97] Indeed, the protection of those interests is, in most cases, crucial to the economic and financial health of the creditor. This rational would also support an extension of the ambit of those duties to include duties owed to other constituencies, such as hosts communities, especially where the activities of the company adversely affect such communities.

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[93] See, *Nicholson* v. *Permakraft (New Zealand) ltd.* (1985), 3 ACLC 453; *Kinsela* v. *Russel Kinsela Pty* (1986), 4 NSWLR 722; *Winkworth* v. *Edward Baron Dev. Co. Ltd.* (1986), 1 WLR 1512 H.L. For an indepth analysis of such judicial extension of directors' duties, see J. S. Ziegel, "Creditors as Corporate Stakeholders: The Quiet Revolution-An Anglo-Canadian Perspective" (1993) 43 UTLR 511.

[94] *Ibid* at 1515.

[95] See *Kinsela* v. *Russel Kinsela Pty, supra* note 93.

In the recent past, the Canadian Courts have had the opportunity of deciding whether or not directors of companies at the brink of insolvency, owe a duty to creditors of such companies. In *Peoples Department Stores Inc. (Trustee of) v. Wise*,[98] the Quebec Superior Court agreed with the thrust of English and Commonwealth caselaw authorities imposing a duty on directors whose companies are at the brink of insolvency to consider the interests of creditors and suggested "that Canadian corporate law should evolve in that direction."[99] A gradual evolution of Canadian corporate law towards that direction seem, indeed, presently in progress. As Ground J. of the Ontario Superior Court recently pointed out in *Canbook Distribution Corp. v. Borins*,[100]

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[96] C. C. Nicholls, "Liability of Corporate Officers and Directors to Third Parties" (2001) 35:1 C.B.C.J. 1 at 34.

[97] J. Ziegel, *supra* note 93 at 530.

[98] [1998] Q. J. No. 3571 (QL)

[99] *Ibid* at para. 200.

[100] (1999) 45 O. R. (3d) 565 (Ont. Sup. Court) at 572

> **Canadian law appears to be moving in the direction of recognising such fiduciary duty, particularly in situations where the corporation was insolvent when it entered the challenged transactions or the challenged transaction rendered the corporation insolvent**

It is however suggested that such evolution should be accompanied by clearly defined rules and parameters. That way, corporate directors would be insulated from frivolous law suits.

b. Constituency Representative Board

The mandatory corporate structure advocated herein might, admittedly, pose some problems of implementation or observance within the corporation. The danger exists that corporate directors might disregard such mandatory corporate governance structure by pretending or making it look like they have considered the interests of other corporate constituencies in making management decisions. This problem can be addressed through a restructuring of the composition of corporate boards.

While there is a divergence of opinion among non-shareholder interests advocates as to the nature and /or extent of the restructuring needed in corporate boards, there appears to be a growing consensus among them that corporate statutes must insist that "employees and other groups substantially affected by corporate operations should have a say in its governance."[101] In other words, non-shareholders, whose interests are substantially affected by corporate activities should be empowered by corporate statute to have their representative in the board of directors of such corporation. The Alberta *Business Corporations Act* appears to imbibe this idea.[102]

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[101] R. Nader, M. Green & J. Seligman, *Taming the Giant Corporation* (New York: W.W. Norton, 1976) 123. See also, R. Howse & M. J. Trebilcock, "Protecting the Employment Bargain" (1993) 43 UTLR 751 at 778.

Professor Stone recommends that "general public directors" be appointed by a federal agency to serve on the boards of very large corporations.[103] Other writers have proposed a system that gives to each director, in addition to the general duty to ensure a profitable administration of the corporation, "a separate oversight responsibility, a separate expertise, and a separate constituency so that each important public concern would be guaranteed at least one informed representative on the board."[104]It has also been suggested that workers be given "nondisclaimable rights to participate on an equal basis on the board of directors."[105] Certainly, the most effective means of protecting the interests of nonshareholders is by providing them with seats in corporate boards so that they can take direct participation in corporate decision making process.[106]

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[102] Section 117(4) of the Alberta *Business Corporations Act* by referring to directors appointed by the employees or creditors or a class of employees or creditors permits the appointment of directors by employees or creditors to corporate boards. Directors so appointed are even allowed by that subsection to "give special, but not exclusive, consideration to the interests of those who elected or appointed them." The underlying justification for this provision would seem the need to ensure adequate protection of employees and creditors.

[103] C. Stone, *Where the Law Ends;the Social Control of Corporate Behavior* (New York: Harper & Row, 1975) 46. Its practicability has been questioned on the ground, amongst others, that it is impossible to design a general interest group formula that represents all constituencies affected by corporate activity and that even if such a formula could be designed, there is the danger that such representative would only focus on matters relating to his/her immediate constituency to the detriment of other constituencies. See Ralph Nader et al, *supra* note 101 at 124.

[104] R. Nader et al, *supra* note 101 at 125. The authors suggests that nine corporate directors be appointed, each with specific oversight responsibility for employee welfare; consumer protection; environmental protection and community relations; shareholder rights; compliance with law; finances; purchasing and marketing; management efficiency; and planning and research.

[105] J. W. Singer, "Jobs and Justice: Rethinking the Stakeholder Debate" (1993) 43 UTLR 475 at 509. Some West European countries such as Germany operate a board representative model of codetermination which gives workers and shareholders right to have their representatives on the board of directors. See H. Hansmann, "Worker Participation and Corporate Governance" (1993) 43 UTLR 589 at 600-02; A. F. Conard, "Corporate Constituencies in Western Europe" (1991-92) 21 Stetson L.R.73; K. Van Wezel Stone, "Employees as Stakeholders under State Nonshareholder Constituency Statutes"(1991-92) Stetson L.Rev. 45.

Professor Stone's suggestion would seem to be more suitable to the economies of developing countries. This is because, such appointment of a single "general public director" would be cost-effective. I shall elaborate on this point in Chapter 3.

There is yet another problem that might hinder the efficacy of the corporate governance model advocated herein. That problem relates to the appropriate mechanism for ensuring compliance with the enlarged directors' duties. The question is: who judges whether corporate managers have met the requisite standard for considering non-shareholder interests? The answer could be found in the judicial system. As we have seen, the corporate governance model proposed in this thesis accords non-shareholders, whose interests are substantially affected or are likely to be substantially affected by corporate activity, the right to sue the directors and/or the corporation for breach or to prevent a breach of such duties. The law courts would therefore be in a position to judge compliance with the requisite standards.

In order to ensure that the courts do not blow muted trumpets in this regard, corporate law statutes must vest the courts with appropriate powers to compel compliance. Such statutes must, amongst others, empower the courts to -

1. declare invalid a corporate decision which, if implemented, would so adversely affect the interests of any particular non-shareholder constituency(ies) as to be fragrantly opposed to justice. This would be the case if a proposed corporate activity is such that poses a real likelihood of irreparable danger to the health of the employees or the host community.

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[106] See A. F. Conard, "Reflections on Public Interest Directors" (1977) 75 Mich. L. Rev. 941at 952; K. Van Wezel Stone, "Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities" (1988) 55 U. Chi. L. Rev. 73 at 159.

2. in appropriate cases, stipulate preventative and remedial measures which a corporation must put in place in order to mitigate the likely harmful effects of a proposed corporate activity to non-shareholders before embarking on such activity.

The statute must, however, confer *locus standi* to sue only on those constituencies whose interests would be or are directly substantially affected by corporate activity. Such constituencies must establish a direct link between the corporate activity and their interests, showing, in the process, that irreparable damage would be or has been done to those interests in order to be entitled to invoke the jurisdiction of the court.

V. Modern Corporate Attitude

The long standing dominant idea in corporate governance that the objective of the corporation is shareholders wealth maximization is gradually being replaced by "a recognition that the corporation is a social as well as economic institution, and accordingly that its pursuit of the economic objective must be constrained by social imperatives and may be qualified by social needs."[107] In particular, in the areas of human rights and the environment, many companies the world over now preach corporate social responsibility. Strategic management of the modern corporation is increasingly taken to involve environmental and human rights concern. As Richard Welford puts it,

> companies are beginning to realize that environmental issues need to be addressed for a number of reasons, including consumer pressure, potential savings, legislation and ethics.[108]

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[107] American Law Institute, *supra* note 77 at 71 -72.

[108] R. Welford, *Corporate Environmental Management: Systems & Strategies* (London: Earthscan Publication, Ltd.,1998) at 9. See also, M. Epstein, *Management Accounting Guideline 37, Implementing Corporate Environmental Strategies* (Hamilton Ont: The Society of Management Accountants of Canada) at page 1 where he states that "Corporations are recognising the benefits to the community and to the long-term

In Canada, for example, companies with multinational operations have developed an International Code of Ethics for Canadian Business.[109] This code contains the vision, values and principles of Canadian Business. Although the code is only a statement of values and principles meant to assist individual companies in the development of their own policies and practices relating to corporate social responsibility, it nonetheless represents a commendable effort on the part of Canadian Business. It contains amongst its values "wealth maximization for all stakeholders," (as opposed to shareholders only) and "community benefits." In today's business environment, "no large, publicly-quoted company can sensibly believe in corporate irresponsibility. To that extent responsibility is a given in modern business life. So the defining issue - the one which sorts out companies - is understanding what is meant by responsibility."[110]

The United Nations, through its Secretary General, recently lent its voice in support of corporate social responsibility. The United Nations Global Compact[111] seeks to promote a set of core values or principles for business in terms of human rights, labour and environmental

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corporate profitability of reducing their environmental impact."

[109] See Canadian Business For Social Responsibility, <http://www.cbsr.bc.ca/CBSRguidelines/CommunityDevelop.html > date accessed: 24 January, 2001.

[110] D. Rice, "Corporate Responsibility in the Market Place" (A speech delivered at the Global Public Affairs Institute, Dorchester Hotel, London, 7th October, 1999) [unpublished].

[111] See online <http://unglobalcompact.org >date accessed: 14 October, 2001. See also, the *OECD Guidelines for Multinational Enterprises - Revision 2000* online <http://www.oecd.org/daf/investment/guidelines/> date accessed: 22 November, 2001. Note however that the OECD guidelines, like the U.N. Global Compact, are not binding on companies and are consequently not enforceable.

practices.[112] The Global Compact, though commendable, is neither a regulatory instrument nor a code of conduct.[113] Consequently, its efficacy is open to question. As the Canadian Business for Social Responsibility points out in its recent report,

> while there is considerable government and corporate support, there are also many questions about the viability of the Compact as anything more than a public relations tool. While strong on principles and attempts at business engagement, it does not include specific instructions for how a company is to incorporate the Global Compact principles into its business activities, and there are no mechanisms in place to ensure compliance or corporate accountability.[114]

a. Reasons for the Apparent Change in Corporate Behavioural Attitude

Several reasons are responsible for the shift in corporate behaviour towards social responsibility. In the first place, corporations get involved in social activities with a view to profiting therefrom. Profit in this sense relates to the public goodwill and reputation which corporations inevitably acquire as a result of their involvement in social activities beneficial to the public. This, in turn, translates into public patronage for the company and, presumably, monetary profits.

Second, and closely associated with the first, is the need for corporations to cultivate the image of 'good corporate citizens.' The argument is that the "corporation as an integral part of the community derives its existence and sustenance from it and therefore has a moral obligation to support it."[115] Clearly the need for corporations to be 'good citizens' has its roots in the desire for corporate profit and invariably shareholders- gain.

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[112] Through the nine principles encompassed in the United Nations Global Compact, *ibid*, world business is asked, in respect of human rights, to: (1) support and respect the protection of international human rights within their sphere of influence; (2) make sure their own corporations are not complicit in human rights abuses; in respect of labour rights, to uphold (3) freedom of association and effective recognition of the right to collective bargaining; (4) the elimination of all forms of forced and compulsory labour; (5) the effective abolition of child labour; (6) the elimination of discrimination in respect of employment and occupation; and in respect of the environment, to (7) support a precautionary approach to environmental challenges; (8) undertake initiatives to promote greater environmental responsibility; and (9) encourage the development and diffusion of environmentally friendly technologies.

[113] See, *supra* note 111.

[114] Canadian Business for Social Responsibility, *Government and Corporate Social Responsibility: An Overview of Selected Canadian, European and International Practices* online <http://www.cbsr.ca> at 18, date accessed: 17 October, 2001.

Public relations aside, one of the most compelling reasons why corporations must be socially responsible is the fact that corporations must solve the problems which are in fact created by them. In the quest for corporate profit and shareholders-gain, corporations often cause social dislocations such as environmental degradation and pollution. In Nigeria, for example, studies have shown that between 1976 and 1979, ninety-two percent of the net volume of crude oil spills were caused by 'equipment failure.'[116] Such oil spills not only affect aquatic life and creatures upon which the local communities partly depend for their means of livelihood, they adversely affect the life and health of the local inhabitants. Payment of compensation to these communities is not enough. Oil and Gas corporations must evolve a corporate strategy that would ensure that equipment and pipelines are routinely changed and updated in line with developments in technology so as to prevent oil spills resulting from equipment failure. No doubt, this would involve large capital outlay which might be to the detriment of immediate corporate profit and shareholders-gain. Corporate law must insist on corporate accountability and responsibility to the society and must not allow the inordinate pursuit of corporate profit and shareholders-gain cause social dislocation to the society.

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[115] P. I. Blumberg, *supra* note 87 at 7 - 8. See also *A.P Smith Manufacturing Co.* v. *Barlow*, 13 N. J. 145, 98 A. 2d (1953) 581 where the court held : "modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate."

[116] See A. E. Ogbuigwe, "Compensation and Liability for Oil Pollution in Nigeria" (1985) 3 J. PPL. 21-23. Mr. Ogbuigwe relie on a report by S. A. Awotayo "An analysis of Oil Spill Incidents in Nigeria 1979 - 1980" in *The Petroleum Industry and the Nigerian Environment : Proceedings of the 1981 International Conference* [unpublished].

The preceding point lends itself to analysis from another perspective albeit an economic one. Where, in the quest for corporate profit and shareholder-gain, the activities of a corporation causes harmful social dislocations to the society, income accruing from such activities cannot, strictly speaking, be regarded as profit or gain. The cost of remedying such social dislocations must be deducted from that income. The remainder or balance, if any, then becomes profit or loss. This is in accord with ordinary business practice. Contractarians often ignore this fact by focussing exclusively on shareholders-gain without concomitantly considering the cost of achieving that gain.

Sometimes, corporations get involved in social responsibility in order to prevent adverse societal and governmental reaction. Voluntary corporate participation in social activities renders nugatory the need for government to introduce a compulsive legal regime in that regard. This would make corporations avoid sanctions which would have been prescribed in such legislation if introduced.

The local, social and economic situation in a country might dictate the imperativeness of corporate social responsibility. This is particularly so in developing countries. Multinational business corporations have enormous powers in world economic politics. A great majority of these corporations doing business in the developing economies have, as their raw materials, the natural mineral resources which these countries are endowed with. In most of these countries, and especially in Nigeria, these natural mineral resources are located in the remote and poor rural communities which depend on subsistence farming and fishing for their livelihood. The exploitation of these resources leave in its wake ecological disequilibrium. The environment is polluted, rivers and streams contaminated, and land impoverished. Should corporate law keep mute and allow a corporation, for example, in the pursuit of shareholders-gain to contaminate the local stream of the poor rural communities upon which they depend for their drinking water without concomitantly imposing a duty on such corporation to provide an alternative source of portable water supply to that community?

Social circumstances in these countries, such as the above, dictate that corporations should be involved in social activities beneficial to the local communities without necessarily tying that to corporate profit and shareholders-gain. While it is not considered appropriate for corporate law to compel corporations to be involved in social philanthropical activities even if beneficial to the community, it is suggested that the corporate law of a developing country such as Nigeria provide corporations an enabling environment to do so. Localization of corporate law becomes the more compelling when viewed against the background that law plays a great role in economic development. As aptly observed by a great Nigerian jurist, law, in developing countries, must be a conscious means of economic development.[117] Perhaps, this was the underlying reason for the Nigerian Company Law reform which culminated in the present *Companies and Allied Matters Act*. As pointed out by Dr. Olakunle Orojo, then-chairman of the Nigerian Law Reform Commission,

> (t)he objective of the reform exercise...was to evolve a comprehensive body of legal principles and rules governing companies and *suitable for the circumstances of the country*. These rules should facilitate business activities in the country, while recognising the international implications of company law; protect the interest of the investors, the public and the nation as a whole. *Towards these ends, the Commission...applied the Nigerian circumstances, interests, needs and experiences*

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[117] T.O. Elias, *Law in a Developing Society* (Benin City : Ethiope Publishing Corporation, 1972) at 5.

as the yardstick....[118] (Emphasis added.)

Though the CAMA succeeds in doing so with respect to areas such as the ultra vires rule, it does not truly reflect the Nigerian "circumstances, interests, needs and experiences"insofar as it relates to corporate social responsibility.[119]

VII. Conclusion

The shareholders-wealth maximization norm which has dominated corporate governance for so long a time seems finally to have outlived its usefulness. Modern realities dictate that a new approach to corporate governance need be adopted by both corporate directors and corporate law. Indeed, a recent analysis of the thirty years of academic research on the relationship between the social performance of companies and their financial performance indicate clearly that a positive relationship exist between the two, with the former positively influencing the latter.[120]

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[118] See J.O. Orojo, "An Overview of the Companies and Allied Matters Decree 1990" in E. O. Akanki, ed. *Essays On Company Law* (Lagos: University of Lagos Press, 1992) 1 at 3.

[119] Perhaps such local 'circumstances, interests, needs and experiences' led to the abolition of the *Ultra Vires* rule in Nigeria. See s. 39(3) of the CAMA. That rule had its roots in the House of Lords decision in *Ashbury Railway Carriage Co.* v. *Riche* (1875), L R 7 HL 653 where their Lordships held that a company incorporated under the *Companies Act* had capacity only to do those acts expressly or impliedly authorised by its Memorandum of Association. In effect, that decision prevented a company from engaging in acts not authorised by its Memorandum of Association. This clearly had a negative effect on corporate social responsibility. For example, in *Parke* v. *Daily News* (1962), Ch. 927, it was held that the use of proceeds of sale of defunct newspapers to compensate employees who lost their jobs was ultra vires the company since the company's business had ended. The rule, though meant for the protection of shareholders and creditors of the company, proved unpopular in business circles with the result that several devices were invented to circumvent it. See *Bell Houses Ltd* v. *City Wall Properties Ltd.*, [1966] 2 Q.B 656. The doctrine has also been abolished in Canada and the United Kingdom. See ss. 15(1) and 16(3) of the *Canada Business Corporations Act* and s. 35(1) of the United kingdom *Companies Act, 1989*. It is to be noted however that in Canada, limited aspects of the rule still apply to corporations created by special Act for public purposes. The rational for this was given by the Supreme Court of Canada in *Communities Economic Development Fund* v. *Canadian Pickles Corporation*, [1991] 3 S. C.R. 388 at 406 as being to protect "the public interest because a company created for a specific purpose by an act of a legislature ought not to have the power to do things not in furtherance of that purpose."

Though there exists a clear conflict between shareholders-wealth maximization and corporate social responsibility, such conflict, it is advocated, can be resolved by replacing the primacy currently placed on the former with a legal regime that will mandate and compel corporate directors to consider and balance the interests of non-shareholders contemporaneously with those of the shareholders in determining what is in the best interests of the corporation. In effect, 'best interests of the corporation' need not necessarily be viewed as synonymous with shareholder-gain.

A shift from "profit maximization" to "profit optimization" is an essential step in this direction.[121] By profit optimization is meant a corporate governance structure that takes into consideration negative externalities of corporate activity and a conscious, direct and sincere attempt at preventing or redressing those externalities without viewing the cost of achieving that goal as necessarily reducing corporate profits. Corporate governance based on profit optimization would therefore permit the corporation to actively engage in activities designed to eliminate or minimize negative externalities resulting from corporate activity and therefore participate in the development of the society without losing focus of the fact that shareholders are entitled to a return on their investment. This is compellingly so in the developing economies where there is widespread illiteracy and poverty. This can be achieved by enlarging the scope of the directors fiduciary duties to include a duty or duties owed to non-shareholders. Those duties must, in turn, be justiciable. That is, that corporate law must accord those non-shareholders the legal right to sue the corporation and or the directors to compel compliance with or for a breach of same. This way, corporate law would become more meaningful to all stakeholders in the corporate enterprise.

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[120] See J.D. Margolis & J.P. Walsh, *People and Profits? The Search for a Link Between a Company's Social and Financial Performance* (New Jersey: Lawrence Erlbaum Associates Publishers, 2001) at 1 - 14. The authors however warns at 13 that the result of their analysis should be taken with caution since some "serious methodological concerns have been raised about many of the studies" which formed the basis of the analysis.

[121] See S. Sheikh, *Corporate Social Responsibilities: Law and Practice* (London: Cavendish Publishing Limited, 1996) 1.

CHAPTER 2

THE ENVIRONMENTAL AND HUMAN RIGHTS CRISIS IN NIGERIA'S OIL AND GAS PRODUCING COMMUNITIES

I. Introduction

Oil has consistently played a vital role in the economy of Nigeria since its discovery in the country in 1956. Indeed, it is the main-stay of the economy. It accounts for well over ninety percent (90%) of the total export earnings of the country. This trend is certain to continue for a long time considering the monolithic nature of the Nigerian economy and the absolute dependence on oil as the sole source of foreign exchange earning.

As a result of the strategic economic importance of oil and gas to the economic health of the country, successive governments in Nigeria embarked upon an ambitious legal regime aimed at protecting not only the perceived economic and political interests of the government but also the interests of the multinational oil and gas prospecting and exploration companies operating in the country. In so doing, the economic, social, environmental and, most of all, the fundamental human rights of the inhabitants of the oil and gas producing communities are often times ignored or violated.[1]

The multinational oil and gas companies, hiding under the cover of such legal regime, carry out their corporate activities sometimes in breach of the environmental and human rights of the inhabitants of those communities.[2] As this Chapter will discuss, attempts by the communities to protest against the activities of the oil companies, in turn, attract repressive measures from the government. Such repressive measures have led to and continue to lead to human fatalities and destruction of property in the oil and gas producing communities. Simply put, there is an environmental and human rights crisis in those communities today partly because of the corporate activities of the oil and gas companies.

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[1] For a detailed account of human rights violations associated with oil and gas exploration and production in Nigeria, see: Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York: Human Rights Watch, 1999); Constitutional Rights Project, *Land, Oil and Human Rights in Nigeria's Delta Region* (Lagos: Constitutional Rights Project, 1999).

As was pointed out in the introduction to this thesis, the environmental and human rights crisis in the oil and gas producing region of the country has been caused, in the main, by two factors. These are: (1) neglect and abuse of the region by the Nigerian government; and (2) corporate insensitivity or irresponsibility of the oil and gas companies in relation to the interests and rights of the indigenes of the region. It is beyond the scope of this thesis to explore the role of the state in the perpetration of such wrongs. Rather, Chapter 2 will focus on how oil and gas companies have - in contravention of their social responsibilities established in Chapter 1 - facilitated or failed to halt government abuse as well as contributed to the environmental degradation of the region. My purpose is to underscore the severity of these corporate failings and the need to exact a higher level of social responsibility on companies doing business in Nigeria. The subsequent chapter of the thesis will suggest ways of ameliorating the situation in Nigeria through corporate law reform.

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[2] See Human Rights Watch, *ibid.*, Constitutional Rights Project, *ibid.* A well documented example of human rights violations relates to the oppression of the Ogoni people, a matter which is discussed *infra* at pages 93 - 95. In a recent report by the Globe and Mail Newspaper, a video tape played at a public hearing of the Human Rights Violations Investigations Commission of Nigeria in Port-Harcourt showed "bloated corpses and razed villages, with weeping Ogoni talking about the soldiers who carried out the raids" on their villages. See S. Nolen, "Nigeria Starts to Reveal Dictators' Dirty Secrets" *The Globe and Mail* (24 January, 2001) Front page / A9.

The chapter is divided into several parts. Part II discusses the nature of the legal relationship between the multinational oil and gas companies operating in Nigeria and the Nigerian government, and the impact of that relationship on the environment and human rights of the inhabitants of the oil and gas producing communities. This is necessary because, as I shall argue subsequently, that relationship has, in part, encouraged the oil and gas companies on the path of corporate irresponsibility. Part III attempts an examination of the corporate responsibility of the oil and gas companies in Nigeria's oil and gas producing communities by analysing the effects and impact of oil and gas exploration and exploitation on the statutorily and constitutionally guaranteed environmental and human rights of the inhabitants of those communities. To properly conceptualize those effects and impact, that section begins by examining, albeit briefly, the impact oil and gas exploration and exploitation has on the environment of the communities and how that, in turn, translates into the violation of the human rights of the inhabitants of those communities. Specific instances of complicity of the oil companies in human rights violations which are indicative of corporate irresponsibility on the part of the oil companies in that region of Nigeria are also examined in this section.

II. Nature of the Legal Relationship between Oil and Gas Companies and the Nigerian Government

The framework for petroleum and natural resources development in Nigeria can be said to have been laid down by the *Petroleum Ordinance* of 1889. That Ordinance was followed by the enactment of the *Mineral Regulation (Oil) Ordinance* of 1907.[3] In 1914, the

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[3] L. A. Atsegbua, *A Critical Appraisal of the Modes of Acquisition of Oil Rights in Nigeria* (LL.M Thesis, University of Alberta, 1992) at 7.

Mineral Oils Ordinance[4] was promulgated by the British colonial government "to regulate the right to search for, win and work mineral oils" in Nigeria. Section 3 of that Ordinance made it unlawful "for any person to search or drill for or work mineral oils within or under any lands in Nigeria except under a licence or lease granted by the Governor" under the Ordinance.[5] Predictably, the British colonial government, through s. 6(1)(b) of that Ordinance restricted the grant of licences and leases thereunder to British subjects or companies controlled by British subjects. Subsequently, in 1938, the colonial government granted Shell-BP an oil exploration licence to prospect for oil in the whole of Nigeria.[6]

Following the repeal of s. 6(1)(b) of the *Mineral Oils Ordinance*,[7] other corporate players in the global oil and gas industry were granted licences and leases to prospect for oil in the country. It is therefore safe to conclude that the principal legislation under which the right to prospect for oil was granted by the British colonial government in Nigeria was the *Mineral Oils Ordinance* of 1914.[8] The licences or leases so granted created a contractual and legal relationship between the colonial government and the oil and gas companies.

The concessionary rights granted the oil companies under such licences and leases by the colonial government ensured that the companies benefited almost exclusively from oil exploration. The terms of those concessions were more favourable to the oil companies than to the Nigerian government.[9] As aptly pointed out by Schatzl,

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[4] Cap. 135, Laws of the Federation of Nigeria, 1958 edition. See also *Basic Oil Laws and Concession Contracts*, South and Central Africa (Original Texts) (New York: Barrows Co. Inc., 1959).

[5] It should be noted that the proviso to s. 3 of the *Mineral Oils Ordinance of 1914* validated licences or leases granted under any ordinance repealed by the Ordinance of 1914 such as Ordinance number 19 of 1909.

[6] See H. L. Schatzl, *Petroleum in Nigeria* (Ibadan: Oxford University Press, 1961) at 1.

[7] See *Mineral Oils (Amendment) Act*, 1958, s. 2.

[8] L. A. Atsegbua, *supra* note 3 at 12.

> the laws were meant to induce the oil companies, by favourable contractual terms, to start exploring for petroleum in the Niger Delta's dense forests and mangrove swamps despite the high expenditures necessary for exploring and developing in that area.[10]

Upon the attainment of independence on October 1, 1960, and having realised that the petroleum sector of the Nigerian economy was tied up by a series of unequal contracts which favoured the oil companies heavily, the Nigerian government introduced both legislative and contractual modifications into its relationship with the oil companies. The government no longer viewed the oil industry as merely revenue yielding but also began to see it as capable of "speeding the achievement of financial self reliance, acquiring technology and expertise...."[11] The government therefore felt the need to take overall ownership and control of the country's natural resources, particularly oil.

a. State Participation in Nigeria's Oil Industry

The *Petroleum Act* of 1969 formally introduced the concept of state participation, in the form of equity, in Nigeria's oil and gas industry. Paragraph 34(a), Schedule 1 of that Act provide thus:

> if he considers it to be in the public interest, the Minister may impose on a licence or lease to which this Schedule applies special terms and conditions not inconsistent with this Act including (without prejudice to the generality of the foregoing) terms and

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[9] M. A. Ajomo, "Law and Changing Policy in Nigeria's Oil Industry" in J. A. Omotola, ed., *Law and Development* (Lagos: University of Lagos Press, 1987) 84.

[10] *Supra* note 6 at 94.

[11] K. W. Blinn et al, *International Petroleum Exploration and Exploitation Agreements - Legal, Economic, and Policy Aspects* (New York: Barrows Co. Inc., 1986) 49.

> conditions as to :
> (a) participation by the federal military Government in the venture to which the licence or lease relates,on terms to be negotiated between the Minister and the applicant for the licence or lease.

Government participation in the oil industry was dictated by both political and economic necessity.[12] Today, the Nigerian government participates in the oil and gas industry through the Nigerian National Petroleum Corporation,[13] a wholly owned state corporation.

Government participation with multinational oil companies in the exploration and exploitation of oil and gas in Nigeria is achieved through three ways. These are: joint ventures, petroleum sharing contracts and service contracts.[14] Of the three, the method commonly adopted by the government is the joint venture mechanism. Indeed, all major oil companies operating in Nigeria have joint venture agreements with the government.[15] The share structure in these joint ventures vary. However, the distribution of shares in the joint ventures is the primary determinant of the division of investment in all capital projects undertaken on behalf of the joint venturers by the operating company.[16] The co-venturers are responsible for paying their participating interest share, taxes on their share as well as the costs of operations in accordance with the shares held in the joint venture.[17] However, the Nigerian government only participates in the joint venture during "the production phase of the operations and not during the exploration phase."[18] While the participating shareholders jointly own the oil reserve still in the ground in respect of the area covered by the joint venture, the multinational oil companies alone operate the ventures and take all day to day management decisions.[19]

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[12] K. Adeniji, "State Participation in the Nigerian Petroleum Industry" (1997) 11 J.W.T.L. 156 at 161.

[13] Established under the *Nigerian National Petroleum Corporation Act*, cap. 320, Laws of the Federation of Nigeria, 1990. This Act formally dissolved the Nigerian National Oil Corporation, a state owned corporation established under the repealed Nigerian National Oil Corporation Act, 1971.

[14] See M. M. Olisa, *Nigerian Petroleum Law and Practice* (Ibadan: Fountain Books Ltd., 1987) at 67.

[15] Presently, there are six joint ventures between the Nigerian government represented by the Nigerian National Petroleum Corporation (hereinafter N.N.P.C.) and the multinational oil and gas companies. These joint ventures and their ownership structure are as follows -
a) Shell Petroleum Development Company of Nigeria Limited: N.N.P.C. 60%, Shell 30%, Elf 10%, Agip 5%. This joint venture which is operated by Shell accounts for more than 40% of Nigeria's total oil production.
b) Chevron Nigeria Limited: N.N.P.C. 60%, Chevron 40%.
c) Mobil Producing Nigeria Unlimited: N.N.P.C. 60%, Mobil 40%.
d) Elf Petroleum Nigeria Limited: N.N.P.C. 60%, Elf 40%.
e) Nigerian Agip Oil Company Limited: N.N.P.C. 60%, Agip 20%, Phillips Petroleum 20%.
f) Texaco Overseas Petroleum Company of Nigeria Unlimited: N.N.P.C. 60%, Texaco 20% and Chevron 20%. See Human Rights Watch, *supra* note 1 at 28 - 30.

It need however be pointed out that other than the six major oil and gas companies mentioned above, other multinational oil companies such as Pan Ocean, Statoil, British Petroleum, Sun Oil, Tenneco, Deminex and British Gas are also involved in the Nigerian oil industry. Besides, participation by indigenous oil companies has increased tremendously since 1996 with the promulgation of the *Petroleum (Amendment) Decree* which allow the holder of an oil mining licence to farm out any marginal field within the area covered by the licence with the approval of the President.

In recent years however, there has been a noticeable trend in the relationship between the government and the oil companies. The oil companies seem now to favour production sharing contracts as a result of what they perceive as persistent reluctance on the part of government to release its financial contribution to the operating companies under the joint venture agreements. Under the production sharing contract, the contractor and or operator, that is, the oil company, bears all exploration and production costs and pays taxes and royalties to the government only if oil is produced. The contractor has title to the oil produced but not to oil in the ground.[20]

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[16] See Human Rights Watch, *supra* note 1 at 28.

[17] See M. M. Olisa, *supra* note 14 at 72.

[18] *Ibid.*

[19] Human Rights Watch, *supra* note 1 at 28.

b. Protective Legal Regime

Having successfully entered the foray of oil exploration and exploitation by entering into joint ventures, production sharing contracts or service contracts through the Nigerian National Petroleum Corporation with the multinational oil companies, the Nigerian government next embarked upon the promulgation of laws aimed at protecting its interests and those of the oil companies. This led to the enactment of the *Land Use Decree* (now Act)[21] in 1977.

The *Land Use Act* is arguably one of the most controversial and ambiguous pieces of legislation ever made in Nigeria.[22] Indeed, its effects are, to date, revolutionary in nature. It not only nationalised all land situate in the country and vested same in the government, it also took away all individual rights which Nigerians hitherto had over land. As Professor J.A. Omotola, a leading Nigerian land law scholar points out, "the controversy surrounding the statute stems partly from inelegant draftsmanship which has made the interpretation and construction of its provisions subject of perenial debates and partly from its dramatic impact on land rights."[23]

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[20] *Ibid* at 32. See *Basic Oil Laws and Concession Contracts, South & Central Africa: (Original Texts), Supplement No. 117* (New York, Burrows Co. Inc., 1994) at 106 - 186 for a model Offshore Production Sharing Contract between the Nigerian National Petroleum Corporation and the Multinational oil and gas companies operating in Nigeria.

[21] Cap. 202, Laws of the Federation of Nigeria, 1990.

[22] See Constitutional Rights Project, *Land, Oil and Human Rights in Nigeria's Delta Region* (Lagos: Constitutional Rights Project, 1999) at 1.

[23] Shelter Watch, *Land Use Act: Suggestions for Amendment* (Shelter Watch, June - December, 1996) at 39.

Section 1 of the Act which vest all land in Nigeria in the state provide thus:

> Subject to the provisions of this Act, all land comprised in the territory of each State in the federation are hereby vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.

By virtue of s. 2 of the Act, all land in urban areas are vested under the control and management of the governor of each State while the control and management of all land in rural areas is vested on the local government within the area. The rights of the individual over land is, under the Act, restricted to a mere 'statutory right of occupancy'[24] granted by the Governor in respect of land in urban areas or a 'customary right of occupancy'[25] granted by the local government in respect of land in rural areas. Upon the grant of such statutory right of occupancy, all prior or existing rights to the use and occupation of the land subject of the right of occupancy are automatically extinguished.[26] As the Court pointed out in *Ohenhen v. Uhumuavi*,[27] the tenor of the Act as a single piece of legislation is the nationalisation of all land in the country by vesting of its ownership in the state leaving the private individual with an interest in land which is a mere right of occupancy and which is the only right protected in his favour by law after the promulgation of the Act.

The right of occupancy which, as we have seen, is the only right accorded an individual under the Act can be revoked by the governor for "overriding public interest."[28]

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[24] Section 5(1)(a).

[25] Section 6(1).

[26] Section 5(2).

[27] (1995), 6 N.W.L.R (Part 401) 303.

[28] Section 28(1).

The Act defines overriding public interest as including the requirement of the land by the government for public purposes, mining purposes or for oil pipelines or any purpose connected therewith.[29] It is beyond dispute that oil and gas exploration and exploitation fall within the definition of public purpose under the Act. Therefore, where oil and or gas is or are discovered in land over which an individual already has a right of occupancy, that right may be revoked by the government by invoking the public purpose clause in the Act. In such a case, the holder of that right is only entitled to compensation under the *Minerals Act* or *the Petroleum Act.*[30]

The attempt by the government to protect its perceived interests in oil and gas and those of the oil companies did not stop at the enactment of the *Land Use Act* in 1978. The government elevated the protection of those interests to a constitutional issue in 1979 with the coming into effect of the *Constitution of the Federal Republic of Nigeria, 1979.* Section 40(3) of that Constitution stipulated thus:

> the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.[31]

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[29] See ss. 28(2)(b) & (c). See also s. 51(1) of the Act which contains an exhaustive definition of 'public purpose'.

[30] Section 29(2).

[31] See also s. 44(3) of the *Constitution of the Federal Republic of Nigeria, 1999* for a similar provision. It is note worthy that the *1979 Constitution* of Nigeria was drafted by a constituent assembly comprising publicly elected members and government nominees during the process of the first transition from military governance to civil rule in the country. The original draft of the Constitution submitted by the constituent assembly to the then Federal Military Government headed by General Olusegun Obasanjo (who incidentally is, at the moment, the democratically elected president of Nigeria) did not include s. 40(3). That section was inserted into the Constitution by the Military government. Section 42(3) of the *1989 Constitution* of Nigeria contained a similar provision. The *1979 Constitution* was suspended by the military after a *coup de ' tat* in 1984. The *1989*

c. Impact of the Legal Framework

The legal framework for oil and gas exploration and exploitation in Nigeria discussed above has had a phenomenal and revolutionary impact on the rights of Nigerians. That impact is felt more in the oil and gas producing communities. As we have seen, the *Land Use Act* nationalised all land situate in the country and reduced individual right over land to a mere 'right of occupancy' which may be revoked by the government for overriding public purpose. The 1979 *Constitution,* on the other hand, vested ownership of all mineral oils and natural gas in Nigeria on the government. The result is that whereas prior to the advent of the *Land Use Act*, the oil companies operating in the country recognised and related with the indigenous communities and individuals as owners of the land, those companies now deal only with the government as regards their corporate activities. They are therefore only answerable and accountable to the government but not to their host communities.

This fact coupled with the special contractual relationship between the government and the oil companies explored briefly above creates a very conducive environment not only for ignoring the interests, but also for the violation of the rights of the inhabitants of those communities by both the government and the oil companies. As shall be evident shortly, the Nigerian government has often adopted repressive measures in dealing with perceived threats to its interests in the oil and gas sector of the country's economy. Those interests, by virtue

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Constitution which was a product of a political transition program implemented by General Ibrahim Babangida was also suspended by the military in 1993 through the *Constitution (Suspension and Modification) Decree* No. 17 of 1993 which, in general terms, restored the *1979 Constitution* whilst suspending some aspects of the fundamental human rights guaranteed under that Constitution. A Constitution Review Committee set up in 1998 recommended the adoption of the *1979 Constitution* with some modification. The result is that the *1999 Constitution* which is the current constitution of the country, is, with a few exception, the same as the *1979 Constitution.*

of the joint ventures or production sharing contracts the government entered into with the oil companies, are inextricably linked to and tied with the interests of the oil companies. Consequently, the oil companies, it would appear, have progressively become complacent in the way and manner they carry out their corporate activities vis-a-vis the interests and rights of the communities. That is the case I shall attempt to make below.

III. Oil and Gas Exploration and Exploitation in Nigeria: Effects on the Oil Producing Communities

a. Oil Operations and the Nigerian Environment

Oil operations in Nigeria's delta region have a phenomenal impact on the environment and consequently the lives of the inhabitants of that area. This problem is exacerbated by the fact that, unlike in most oil-producing countries in the developed world, exploration for and exploitation of oil in Nigeria takes place in or near inhabited areas or areas used for farming.[32]

The predominant way in which oil operations affect the lives of the people is through pollution. Pollution in this regard is either air-related[33] (such as gas flaring), or water-related. Although, the term has been subjected to various definitions, Professor O. Akanle, a leading Nigerian scholar, offers a definition, which in the context of this thesis appears apposite. He defines pollution as the wrongful contamination of the atmosphere or of water or of soil, to the material injury or damage to the rights or property of people.[34] Taken one step further, pollution herein is "...the introduction by man directly or indirectly of substances or energy into the environment, resulting in such deleterious effects as harm to living resources, hazards to human health, hindrance to marine activities including fishing, impairment of quality for use of sea water and reduction of amenities."[35]

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[32] See D. Iyalomhe, *Environmental Regulation of the Oil and Gas Industry in Nigeria: Lessons from Alberta's Experience* (LL.M. Thesis, University of Alberta, 1998) at 29.

[33] See E.C. Udogwu, "Economic and Social Impacts of Environmental Regulation on the Petroleum Industry in Nigeria" in *The Petroleum Industry and the Nigerian Environment* (Lagos: Federal Ministry of Housing and Environment, 1981) 49 at 50-52.

[34] O. Akanle, "Pollution Control Regulation in the Nigerian Oil Industry" in J.A. Omotola ed., *Law and Development* (Lagos: University of Lagos Press, 1987) 2.

i. Gas Flaring

In the production of crude oil, a very large quantity of associated gas is also produced in conjunction therewith. Healthy environmental practices dictate that such associated gas be re-injected. However, instead of re-injecting such gas, all oil companies in Nigeria have consistently engaged in flaring the gas. The practice of gas flaring is so rampart in Nigeria that today, the country is ranked top among gas - flaring nations.[36] It is estimated that 75% of total gas production and 95% of associated gas in Nigeria is flared.[37]

Gas flaring not only lead to emission of green-house gases which result in the warming of the atmosphere but has also been shown by at least one study to have a negative impact on crop yield and vegetation of the oil producing communities in Nigeria.[38] A study has also revealed that in the area, soil, air and leaf temperatures increased as a result of gas flaring and that specie composition of vegetation has been adversely affected.[39]

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[35] This is the definition offered by the Group of Experts on the Scientific Aspects of Marine pollution quoted by O. Adewale in his article "Environmental Pollution in the Petroleum Industry" (1991) 12 Justice 9.

[36] Human Rights Watch, *supra*, note 1 at 72

[37] S. A. Khan, *Nigeria: The Political Economy of Oil* (Oxford: Oxford University Press, 1994) at 162.

[38] R. O. Ojikutu, "Sustainable Development, Oil Communities and the Oil Industry" (Unpublished paper presented at a seminar on Oil and Gas Law, University of Lagos, Nigeria, 14 - 16 May, 1996) 11. Ojikutu relied on a Report by Ukegbu and Okeke.

[39] See A. O. Isichei & W. W. Sanford, "The Effects of Waste Gas Flares on the Surrounding Vegetation in South - Eastern Nigeria" (1976) 13 Journal of Applied Ecology, 177 - 187.

As noted earlier, the people of Nigeria's delta depend mainly on subsistence farming and fishing for their livelihood. Viewed against this background, gas flaring adversely affect the lives of the people. Gas flaring has either completely destroyed agricultural crops and products or rendered the cultivation and growth of same stunted. Land has been rendered barren and impoverished and aquatic life has diminished. The problem is compounded by the fact that in some cases, gas flaring occurs very close to areas inhabited by people.

Gas flaring not only visits economic difficulty on the people but would also appear to pose serious health hazards. Although there is a paucity of scientific research and data on such health hazards, there is a strong suspicion that respiratory problems commonly reported in the area amongst children might be linked with gas flaring.[40] The oil producing communities also believe that gas flares cause acid rain which in turn results in corrosion of the metal sheets used for roofing of homes.[41]

Nigerian law prohibits the flaring of gas subject to some exceptions. The *Associated Gas Re-Injection Act*[42] provide, in s. 3(1) that:

> (s)subject to subsection (2) of this section, no company engaged in the production of oil or gas shall after 1st January, 1984 flare gas produced in association with oil without the permission in writing of the Minister.

The Minister may, if satisfied after 1st January, 1984 that it is not appropriate or feasible to utilize or re-inject the gas in a particular field(s), issue a certificate of exemption from the provisions of s. 3(1) of the Act upon such terms and conditions as he/she may deem fit to impose[43] or upon the payment of a sum of money as may be prescribed by the minister from time to time.[44]

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[40] Human Rights Watch, *supra* note 1 at 74.

[41] *Ibid* at 73. This claim has however been disputed by Shell Petroleum Development Company Limited (hereinafter SPDC). See *S.P.D.C. Page Fact Book 1993*; Environmental Resources Managers Limited, *Niger Delta Environmental Survey Final Report,* Phase 1, volume 1, s. 3.3.2 at 244.

[42] Cap. 26, Laws of the Federation of Nigeria, 1990.

The penalty for non-compliance with s. 3(1) of the Act is stated to be forfeiture, at the Minister's discretion, of the concession(s) or licence in respect of the field(s) in which the gas flaring takes place[45] and or the "withholding of all or part of any entitlements of any offending person towards the cost of completion or implementation of a desirable re-injection scheme, or the repair or restoration of any reservoir in the field in accordance with good oilfield practice."[46]

Despite its hazardous consequences and in spite of Nigerian laws and regulations[47] prohibiting it, gas flaring continues unabated in Nigeria today. To a discerning observer of the economic landscape in Nigeria, the reasons are quite easy to fathom. First, the Nigerian government has never been steadfast in the implementation of the provisions of the *Associated Gas Re-Injection Act*. This is evident in the fact that the government has often extended the terminal date prescribed in the Act for stoppage of gas flaring in the country. In 1984, for example, that date was extended to January 1, 1985.[48] Besides, the government has often exempted most oil wells from complying with s. 3(1) of the Act. For example, out of the 84 oil wells owned by Shell in 1985, 55 were exempted while 29 were fined for gas flaring. In the same year, 10 of the 15 oil-wells owned by Mobil were exempted while 5 were fined. Out of Gulf Oil's (now Chevron) 17 wells, 7 were exempted while 10 were fined.[49] Despite the various extensions of the terminal date, the oil companies are still actively flaring gas in Nigeria today. Indeed, the position is likely to remain so, at least, in the near future. Shell states categorically that it is only "committed to stopping routine flaring by 2008 through gathering the gas for resale or re-injection."[50]

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[43] *Associated Gas Re-Injection Act, ibid,* s. 3(2).

[44] *Ibid* s. 3(2)(b).

[45] *Ibid* s. 4(1).

[46] *Ibid* s. 4(2).

[47] See, for example, *Associated Gas Re-Injection Act*, Cap. 26, Laws of the Federation of Nigeria, 1990.

[48] M. M. Olisa, *Nigerian Petroleum Law and Practice, supra* note 14 at 50.

Second, oil companies flare gas in Nigeria because it is uneconomical to do otherwise. The construction of gas transmission facilities would involve the companies in huge capital costs which, in turn, would adversely affect their profits. Only recently, a top official of Shell Nigeria provided corroboration for this view, albeit inadvertently, thus:

> Gas has been flared in Nigeria because of the limited opportunities for its utilisation. One may need to ask the question: Why is gas flared in Nigeria and why is it taking so long to find a solution to the problem? Among the several reasons are the following: there is a limited number of appropriate reservoirs conducive for gas re-injection/storage; Nigeria's industrial base is low, resulting in low energy consumption; the huge cost of developing major gas transmission facilities; limited regional and international gas markets; historical inappropriate fiscal and gas pricing policies.[51]

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[49] J. G. Frynas, *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities* (Hamburg, LIT VERLAG Munster, 2000) at 88.

[50] S.P.D.C., *People and Environment: Annual Report 1999*, online <http://www.shellnigeria.com/frame.asp?Page=news >, date accessed: 26 September, 2001.

[51] R. M. Van Den Berg, Managing Director, The Shell Petroleum Development Company of Nigeria Limited, in *Statement /Submission to the Human Rights Violations Investigation Commission of Nigeria*, dated 24 May, 2001. For the full Statement /Submission, visit Shell online <http://www.shellnigeria.com/frame.asp?Page=news >, date accessed: 24 September, 2001.

The cost of re-injecting associated gas is considerably higher than the cost of flaring.[52] Thus, it is:

> often cheaper for oil companies to continue gas flaring than to invest in gas projects.... At the end of the 1980s, Chevron (formerly Gulf) noted that switching from water injection to gas injection would cost the company US$ 56 million. In effect, compliance with the Gas Re-injection Decree (Act) would cost the company US$ 56 million, compared with a mere US$ 1 million/year which the company had to pay in gas flaring fines. It was therefore cheaper for the company to continue gas flaring.[53]

The fine for gas flaring under the *Associated Gas Re-injection Regulations* was, in 1985, fixed at 2 kobo per 28.317 standard cubic metres of gas flared.[54] In 1996, the fine was increased to 50 kobo per thousand standard cubic feet and to 10 Naira in 1998.[55] Oil companies would rather pay the meagre fines for gas flaring prescribed under the *Associated Gas Re-injection Regulations* than spend large sums of money on gas re-injection.[56] This attitude is apparently motivated by the desire to maximize corporate profits and shareholder - value. Taking a gaze into the future, it is probably true to say that gas flaring is likely to end in Nigeria not as a result of gas related legislation, but through an improvement of fiscal incentives for the oil companies to end it.[57] For the time being however, "there is little commercial incentive for oil companies to stop gas flaring and to comply with gas related legislation" in the country.[58]

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[52] Y. Omoregbe, "Law and Investor Protection in the Nigerian Natural Gas Industry" (1996) 14: 2 J.E.N.R.L. 179.

[53] J. G. Frynas, *supra* note 49 at 88.

[54] M. M. Olisa, *supra* note 14 at 51.

[55] J. G. Frynas, *supra* note 49 at 89.

[56] S. A. Khan, *supra* note 37 at 162.

[57] J. G. Frynas, *supra* note 49 at 89.

Although s. 4(1) of the *Associated Gas Re-Injection Act*[59] provide that companies engaged in gas flaring after January 1, 1984 without permission shall forfeit the oil concession(s) granted them in the particular field(s) in relation to which the gas flaring takes place, this provision has, to the knowledge of the author, never been invoked by the Nigerian government. The oil companies are all too aware that due to the strategic importance of oil and gas to the economic well-being of the country and the huge capital investment ploughed into oil and gas exploration and exploitation by both the government and the oil companies in accordance with their joint venture agreements, it is very unlikely that that provision of the Act would be invoked by the government.

ii. Oil Spills

Although oil operations impacts negatively on the lives of the people of Nigeria's delta in several ways, oil spills and the resultant pollution have, by far, posed a greater threat to the people. Admittedly, oil spills are an inevitable corollary of oil exploration and production anywhere in the world. However, the frequency with which oil spills occur in Nigeria demonstrates convincingly that something is terribly wrong with the Nigerian situation. Oil spills are a recurring event in Nigeria particularly in the oil and gas producing areas. Between 1976 and 1986 for example, 2,005 incidents of oil spill are said to have occurred in the country resulting in 2,085,280 barrels of crude oil being lost to the environment. Out of this amount, only about 524,945 barrels were said to have been recovered.[60] Another study reveals that between 1976 and 1980, a total of 784 incidents of oil spill occurred in the country.[61]

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[58] *Ibid.*

[59] *Supra* note 42.

An environmental survey carried out by an environmental resources group in Nigeria indicate that based on statistics from the Department of Petroleum Resources, a total of 4,835 incidents of oil spill occurred between 1976 and 1996 resulting in the spillage of at least 2,446,322 barrels of crude oil out of which about 1,896,930 barrels were lost to the environment.[62]

The year 1980 recorded the highest single incident of oil spill in Nigeria. In that year, an offshore oil-well belonging to Texaco experienced a blowout which resulted in oil being spewed into the Atlantic ocean and consequently destroying 340 hectares of mangrove forest.[63] The exact number of barrels of crude oil spilled in this incident remains, to date, a matter of dispute. While oil industry operators estimate that at least 200,000 barrels were spilled from the blow-out,[64] the Department of Petroleum Resources put the estimate at 400,000 barrels.[65]

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[60] See R. O. Ojikutu, *supra* note 38 at 8.

[61] E. A. Ogbuigwe, "Compensation and Liability for Oil Pollution in Nigeria" (1985) 3 Journal of Private and Property Law 23. Ogbuigwe relies on a report by S. A. Awotayo, "An Analysis of Oil Spill Incidents in Nigeria 1979 - 1980" in *Petroleum Industry and the Nigerian Environment: Proceedings of the 1981 International Conference.*

[62] Environmental Resources Managers Limited, *Niger Delta Environmental Survey Final Report*, Phase 1, Volume 1, at 249

[63] Human Rights Watch, *supra* note 1 at 60.

[64] See *Oil Spill Intelligence Report*, Volume 21, No. 4 (Arlington, Massachusetts, January 22, 1998.)

[65] Environmental Resources Managers Limited, *supra* note 62 at 250.

This alarming rate of oil spillage continue in Nigeria today.[66] Indeed, official estimates by the Nigerian National Petroleum Corporation approximates that 2,300 cubic metres of crude oil are spilled in 300 (three hundred) separate incidents annually.[67]

There are two main reasons for the high rate of oil spill in Nigeria. These are (1) equipment failure or malfunction, and (2) sabotage. As some Nigerian writers have pointed out, oil spills in the country are caused mainly by equipment failure or malfunction.[68] This is due to the fact that most of the petroleum exploration, exploitation and transportation equipment in the country are very old. Most of the oil pipelines in Nigeria were constructed well over thirty years ago as against the fact that the estimated lifespan of a pipeline is fifteen years.[69] Shell Nigeria, for example, admits that most of its facilities were constructed in the 1960s and 1970s to the then prevailing standards.[70]

A second reason for the high rate of oil spill is sabotage deliberately caused either by some of the disgruntled indigenes of the oil and gas producing communities or persons engaged in illegal bunkering of crude oil. There is however a dispute between the oil and gas companies on the one hand, and the oil and gas producing communities on the other, as to the percentage of oil spill caused by sabotage. Oil companies often blame oil spills on sabotage. In 1996, for example, Shell claimed that more than 60% of oil spilled at its facilities in Nigeria were caused by sabotage.[71] Yet again, in its 1999 Annual Report, Shell claimed that sabotage accounted for 50% of the total number of spills in 1999 and over 70% of the total volume spilled.[72]

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[66] For example, on January 12, 1998, a major spill occurred at Mobil's Idaho Platform spilling more than 40,000 barrels of crude oil. On March 12, 1998, Shell"s Jones Creek Flow station spilled 20,000 barrels. See Human Rights Watch, supra, note 1 at 60 - 61. In January 2001, a pipeline belonging to Shell exploded in Warri, Delta State spilling about a million barrels of oil in the area. See F. Obinor, "Pipeline Explosion Rocks Delta Community" *The [Nigeria]Guardian Newspaper* (9 January, 2001) online < http://ngrguardiannews.com > date accessed: 9 January, 2001.

[67] Human Rights Watch, *supra* note 1 at 59. It should however be noted that these estimates are based on the number of reported cases of oil spills. Viewed against the background that most oil spills in Nigeria are unreported, the actual number of barrels of oil spilled in Nigeria annually are, arguably, higher than the estimates.

[68] E. A. Ogbuigwe, "Compensation and Liability for Oil Pollution in Nigeria" (1985) 3 J. PPL 21 - 23; C. N. Ifeadi & J. N. Nwankwo, "Critical Analysis of Oil Spill Incidents in Nigerian Petroleum Industry" in *The Petroleum Industry and the Nigerian Environment* (Lagos: Federal Ministry of Housing and Environment, 1987) 104 at 108 - 109.

[69] Human Rights Watch, *supra* note 1 at 61.

[70] See SPDC, *Frequently Asked Questions*, online <http://www.shellnigeria.com/frame.asp?Page=faq> date accessed: 24 September, 2001.

Official government statistics do not, however, support the claims by the oil and gas companies. Between 1976 and 1990, statistics collated by the Department of Petroleum Resources indicate that sabotage accounted for only 4% of all oil spills in the country.[73] On the basis of the said government statistics, an independent research group indicates that within the said period, equipment failure accounted for 38% of the oil spilled, while corrosion accounted for 33% and blow out 20%.[74]In the same way, the World Bank in its 1995 report stated that oil spills in Nigeria are caused mainly by the companies themselves and that corrosion is the most frequent cause.[75] A recent publication on the issue which analysed

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[71] See S.P.D.C., *People and Environment: Annual Report 1996.*

[72] See S.P.D.C., *People and Environment: Annual Report 1999*, online <http://www.shellnigeria.com/frame.asp?Page=news > date accessed: 26 September, 2001.

[73] Environmental Resources Managers Ltc., *supra* note 62 at 253.

[74] Environmental Resources Managers Ltd., *ibid.*

[75] See World Bank, *Defining an Environmental Development Strategy for the Niger Delta* (World Bank, 1995) volume II, annex M.

Shell's oil spill figures in Delta State covering the period 1991 - 1994 indicates that contrary to Shell's claim that sabotage accounts for most of its oil spill, the age of its pipelines and flowlines largely determined the frequency of its oil leaks. It concluded that 95% of the spills occurred in flowlines 11 years or older.[76]

Perhaps, oil companies are tempted to claim that oil spills results from sabotage in order to avoid paying compensation for any damage which may result therefrom.[77] Under s. 11(5)(c) of the *Oil Pipelines Act,*[78] oil companies are not liable to pay compensation to victims of oil spill if the spill is caused by the act or default of the victim or by the malicious act of a third person.

The oil companies' attitude to the clean-up of spill sites sometimes leaves much to be desired. A socially responsible company would clean up spill sites in a timely manner. Indeed, the regulations of the Department of Petroleum Resources not only require oil companies to clean up spill sites and restore them to their original condition as soon as possible, but also that a spill site on land must, after six months, contain no more than thirty parts per million (ppm) of oil.[79] The experience in Nigeria indicates that it takes several months (and sometimes several years) for spill sites to be cleaned up. For example, the clean up of a spill in Aleibiri, Bayelsa State which occurred in March, 1997 was only begun by Shell in November, 1997, a period of about eight months.[80] Constitutional Rights Project reported in 1999 that a spill which occurred in Ubulu flow station in 1970 was, as at 1999, yet to be cleaned.[81]

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[76] J. G. Frynas, *supra* note 49 at 166.

[77] J. G. Frynas, *ibid* at 165 - 166.

[78] Cap. 338, Laws of the Federation of Nigeria, 1990.

[79] Human Rights Watch, *supra* note 1 at 61.

Sometimes too, the oil companies engage in improper and unhealthy clean-up practices such as gathering contaminated materials into heaps for burning. Human Rights Watch reports, for example, that "at Koko creek flow station, a spill that Shell alleged was caused by sabotage occurred in July, 1997, and was cleaned by putting contaminated soil into pits; one year later, during flood season, the community believed that a new spill had taken place when this oil was released back into the water."[82] Shell however states that its official policy on spill sites clean up is that "all hydrocarbon and chemical spills in the vicinity of the company's operations shall be cleaned up in a timely and efficient manner.[83] Surely, the burning of heaps of contaminated oil spill materials or the putting of contaminated soil into pits fails to meet this standard.

b. Oil Operations: Impact on Human Rights

It is perhaps apt to point out at the outset that due to the paucity of scientific research and data on the subject, the impact of the corporate activities of the oil and gas companies particularly in relation to oil spills and gas flaring and the resultant hydrocarbon pollution on the environment and people of Nigeria's delta remain largely unknown. As some observers have noted, the area has continuously experienced so many incidents of oil spills and gas flaring that it may take a long time for all the effects to manifest themselves.[84]

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[80] *Ibid* at 62.

[81] *Supra* note 22 at 20. See also, I. C. Amajor, "The Ejamah-Ebulu Oil Spill of 1970: A Case History of a 14 Years Old Spill" in *Petroleum Industry and the Nigerian Environment* (Lagos: NNPC / Federal Ministry of Works and Housing, 1985).

[82] Human Rights Watch, *supra* note 1 at 62.

[83] SPDC, *People and Environment: Annual Report 1996.*

The little scientific research and data presently available on the subject however indicate clearly that oil spills and gas flaring have debilitating and hazardous effects on the environment and people of the area. Those effects have been shown to be long lasting on the environment.[85]

Generally speaking, oil operations affect the people in two main ways, viz, economically, and in respect of the enjoyment of their fundamental human rights. As pointed out earlier, the people are mainly subsistence farmers and fishers. Contamination and pollution of the land, creeks, streams and rivers upon which they depend for their livelihood lead to low agricultural production and depletion of water and coastal resources. This in turn translates into economic hardship for the people. However, it is in the area of human rights that oil operations has wreaked more havoc on the people. In fact, the corporate activities of the oil and gas companies have a debilitating impact on those rights. As shall soon be evident, despite what would ordinarily seem an elaborate constitutional scheme guaranteeing fundamental human rights in Nigeria, oil operations, either directly or indirectly, have consistently led and continues to lead to numerous instances of human rights violations in Nigeria's oil producing communities. Until the occurrence of two relatively recent incidents - the Umuechen massacres and the Ogoni crisis,[86] the extent of human rights violations resulting from oil operations in Nigeria was largely unknown to the international community.

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[84] See Constitutional Rights Project, *supra* note 22 at 20.

[85] See E. Asuquo Obot, A. Chinda, & S. Braid, "Vegetation Recovery and Herbaceous Production in a Freshwater Wetland 19 years after a Major Spill" (1992) 30 African Journal of Ecology 149. This study reveal that a major oil spill at Ebubu, Ogoniland in 1970 still had degrading effect on the vegetation of the area down stream of the spill 19 years after the spill due to a slow seepage of the crude oil from the spill site.

Before delving into the specifics of the effects of oil operations on human rights in the oil and gas producing communities of Nigeria, I need to make two essential preliminary points on apparent differences between human rights legislation in Nigeria and Canada. First, fundamental human rights provisions in Nigeria are enshrined in the Constitution. Consequently, those provisions are constitutional in nature. In effect, Nigeria does not have a separate statute which guarantees fundamental rights other than the Constitution. In Canada, however, the *Canadian Human Rights Act*[87] and its corresponding Provincial human rights legislation, are separate and distinct from the Canadian Constitution. The provisions of human rights laws in Canada have, however, been held by the Supreme Court of Canada to be "near constitutional in nature" differing only in that they govern relations in the private and public sectors, while the Constitution applies only to government.[88]

Second, unlike Canada where the *Charter of Rights and Freedoms* apply only "to the Parliament and government of Canada" and "to the legislature and government of each province,"[89] the fundamental rights provisions in Chapter IV of the *Constitution of the Federal Republic of Nigeria, 1999* are not so restricted. Those provisions apply to governments and private individuals alike.[90] This is made clear in s. 1(1) of the *Constitution* which provides that:

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[86] See pages 92 - 95 *infra* for a brief discussion of the Umuechen massacres and the Ogoni crisis.

[87] S. C. 1976-77.

[88] See *Ontario Human Rights Commission v. Simpsons-Sears Ltd*, [1985] 2 S. C. R. 536 (S.C.C.); *Robichaud v. Brennan*, [1987] 2 S. C. R. 84 (S.C.C.).

[89] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, c.32 (1).

> (t)his Constitution is supreme and its provisions *shall have binding force on all authorities and persons* throughout the Federal Republic of Nigeria.[91] (Emphasis added)

It is trite law that the word 'person' means both natural and un-natural persons. Corporations being un-natural persons[92] in law qualify as 'persons' within the meaning of the *Constitution*. Consequently, they are bound by its provisions. Added vent is given to the above position by s. 318(4) of the *1999 Constitution* which stipulates that "the *Interpretation Act* shall apply for the purposes of interpreting the provisions of this Constitution."[93] Section 18 (1) of the *Interpretation Act*[94] defines a person as including "any body of persons corporate or incorporate." A corporation is a body corporate. It is therefore a person albeit an un-natural one. It is thus clear that corporations are persons within the *1999 Constitution* and are consequently bound to observe its provisions including the fundamental rights provisions.[95]

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[90] See *Boniface Ezeadukwa v. Peter Maduka & Others* (1997), 8 N.W.L.R. (Part 518) at 635.

[91] See the *1979 Constitution*, s. 1(1), and the *1989 Constitution*, s. 1(1) for identical provisions. Note that the Supreme Court of Nigeria, sitting as a full court, held in *Attorney General of Bendel State v. Attorney General of the Federation & 22 Others* (1982), 3 N.C.L.R. 1 that in the interpretation of the Constitution, effect must be given to every word used in the Constitution, and where the language of the Constitution is clear and unambiguous, it must be given its plain evident meaning.

[92] See *Salomon v. Salomon*, [1897] A. C 22 (H.L.).

[93] See the *1989 Constitution*, s. 329 (4) for an identical provision. Note that in Canada, neither the Federal nor Provincial *Interpretation Acts* have any application to the interpretation of the *Canadian Charter of Rights and Freedoms*. See *Law Society of Upper Canada v. Skapinker*, [1984] 1 S. C. R. 357 at 370 (S.C.C.).

[94] Cap. 192, Laws of the Federation of Nigeria, 1990.

Therefore, whereas private individuals are not susceptible to actions under the *Canadian Charter of Rights and Freedoms*, private individuals are susceptible to actions for human rights violations under the fundamental rights provisions in chapter IV of the *1999 Constitution* of Nigeria.[96]

i. The Right to Life

The most basic of all human rights is the right to life. All other human rights derive from and revolve round it. In other words, the right to life is a *sine qua non* to the enjoyment of all other human rights. Interference with the right to life renders all other rights meaningless.

The right to life is guaranteed under s. 33(1) of the *1999 Constitution* of Nigeria. That section provides as follows:

> Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.[97]

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[95] Indeed, there is ground to argue that the word 'authority' as used in s. 1(1) of the *1999 Constitution* is not limited to governmental authority. Section 318(1) of that Constitution, which deals with its interpretation, provides that 'authority' as used in the Constitution, "includes government." The use of the word 'includes' in that subsection is instructive. It indicates that 'authority' as defined therein is not exhaustive. 'Authority' other than government authority therefore qualify as 'authority' within the intendment of the Constitution. Thus, non-governmental authority is cognisable under the Constitution and is consequently bound by its provisions. If the Constitution intended to restrict the meaning of 'authority' to governmental authority, it would simply have provided that 'authority means government authority.' If that were the case, no other form of authority would have been cognisable under the Constitution.

[96] See *Boniface Ezeadukwa v. Peter Maduka & Others, supra* note 90.

[97] It should however be noted that the right to life is not an absolute right under the Nigeria Constitution. Subsection 2 of s. 33 of that Constitution permits the infraction of the right in limited circumstances. It stipulates that a person shall not be regarded as having been deprived of his life in contravention of s. 33(1) "if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary - (a.) for the defence of any person from unlawful violence or for the defence of property; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or (c)

The right to life is sacrosanct and non-derogable except in the limited circumstances permitted by the Constitution. Therefore, subject to such exceptions, no one, including the State as represented by the government, has a right to take human life.

Under the United Nations' Universal Declaration of Human Rights,[98] the African Charter on Human and Peoples' Rights 1981,[99] and the *1999 Constitution* of Nigeria, the state has an obligation to protect and safeguard human life. That obligation encompasses the duty to prevent situations that might imperil human life.[100] Experience in Nigeria especially in the oil producing communities, however, show that the affirmative duty imposed on the state to protect and safeguard human life is often disregarded. The result is that today, oil and gas exploration and exploitation has had, and continues to have fatal consequences on the lives of the people of the oil producing communities. Oil and gas operations have directly or indirectly led to many deaths[101] in Nigeria in contravention of s. 33(1) of the *1999 Constitution* and identical provisions of previous Constitutions of the country.[102]

The contravention of the right to life through oil and gas operations takes place in two major ways - (a) environmental pollution resulting in human fatalities and, (b) repressive measures taken by the government (sometimes with the material assistance of the oil

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for the purpose of suppressing a riot, insurrection or mutiny."

[98] U.N.G.A. Res. 217 (III), 3 U.N. G.A.O.R. Supp. (No. 13) 17 (1948).

[99] O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1986).

[100] P. D. Okonmah, "Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta" (1997) 41 Journal of African Law 43 at 53.

[101] See *infra* notes 104 - 106.

[102] See, for example, s. 30 of the *1979 Constitution* and s. 32 of the *1989 Constitution* which guaranteed the right to life in identical terms as s. 33 of the *1999 Constitution*.

companies) in response to protests by the communities against continuous degradation and pollution of their environment.

There is an obvious nexus between the right to life and the quality of the environment. A healthy environment sustains life be it human or otherwise. A polluted environment, on the other hand, has negative impact and sometimes fatal consequences on human life. The impact oil spills and the attendant pollution have on the lives of the people of Nigeria's oil producing communities is better appreciated when viewed in the context of the way of life of the people. The oil producing communities of Nigeria are mainly rural communities. Most rural communities in Nigeria lack pipe borne water. Therefore they depend wholly on rivers, streams, ponds, creeks and wells as their source of drinking and bathing water as well as for other domestic use. Where these sources of water are polluted and contaminated from oil spills, as is often the case, they become death traps for the people.

The problem is magnified by the riverine nature of Nigeria' delta region. That region consists primarily of wetlands linked together by rivers, streams and creeks. Therefore, pollution or contamination of one of such rivers, streams or creeks necessarily translates into pollution and contamination of others. One human rights organisation captures the problem in its report graphically thus:

> the problem of oil spills on land in the Niger Delta does not end at the places where the spills are located. They go much farther than that.... The Niger delta is a wetland area, linked by rivers and creeks and also permanently wet. When you have a spill site uncleared for long, what happens is that each time it rains the water mixes with the spilled crude, and carries it, not only through the rivers and creeks, but also through underground water to places far removed from the spill sites.[103]

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[103] Constitutional Rights Project, *supra* note 22 at 21. The report quotes an unnamed official of the Movement for the Survival of Ogoni People (MOSOP).

As pointed out earlier, there is a dearth of scientific research and data on the exact effect of oil-related pollution on the environment and people of the oil producing communities. However, the little data available indicate that oil-related pollution has led to a series of human fatalities and sometimes mysterious diseases in the delta region of Nigeria. For example, Texaco's Funiwa (v) oil blow-out in 1980 was said to have led to the death of about 180 people and the outbreak of a variety of diseases.[104] The untimely death of several people in the area has also been attributed to oil spills.[105]

The Nigerian news media is constantly awash with reports of deaths resulting from oil operations. As recently as December 2000, twenty persons, including eight children aged between five and seven, were reported to have died in Akassa, Brass Local Government Area of Bayelsa State after drinking contaminated water following a spill from Texaco oil pipeline at Funiwa (v) platform.[106] Indeed, there is some evidence suggesting that children have, in the past, died as a result of drinking oil-contaminated water.[107] Besides, diseases such as respiratory disorders, asthma, cancer and birth deformities prevalent in the oil producing area of the country have been attributed to oil-related pollution.[108]

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[104] J. F. Fekumo, "Civil Liability for Damages Caused by Oil Pollution" in J.A. Omotola ed., *Law and Development* (Lagos: University of Lagos Press, 1987) 254 at 267 - 68. See also, E. Hutchful, "Oil Companies and Environmental Pollution in Nigeria" in Claude Ake ed., *Political Economy of Nigeria* (London: 1985) 116 at 126.

[105] J. F. Fekumo, *ibid.*

[106] See "Polluted Water Kills 20 in Bayelsa Oil Spill" *The [Nigeria] Guardian* Newspaper (8 December, 2000) online < http://ngrguardiannews.com > date accessed: 8 December, 2000. The children were said to have lost their lives after inadvertently drinking contaminated water while having their bath in a contaminated stream. See also, H. Oliomogbe & P. Achowue, "Toxic Chemicals Kill Eight Children in Bayelsa" *The [Nigeria] Guardian* Newspaper (15 December, 2000) online <http://ngrguardiannews.com > date accessed: 15 December, 2000; S. Oyadongha, "Eight Children Die of Contaminated Water in Brass Local Government" *The [Nigeria] Vanguard* Newspaper (7 December, 2000) online, <http://www.vanguardngr.com > date accessed: 7 December, 2000.

Studies have shown conclusively that drinking water in the oil producing communities contain a dangerously high amount of hydrocarbons. In one instance, a sample of drinking water from Ukpeleide, Ikwerre, analysed in the United States showed that the water contained 34 ppm of hydrocarbons which is said to be 680 times the permissible level in the European Union.[109] It appears undeniable that those hydrocarbons emanates from spilled crude oil.

The fact that crude oil spills have adverse effects on human life appear certain. Crude oil is known to contain a variety of chemicals some of which are toxic while others are carcinogenic. The problem is compounded by the fact that such chemicals last for several years in the polluted water. As the Human Rights Watch points out in its report,

> in many villages near oil installations, even when where there has been no recent spill, an oily sheen can be seen on the water, which in fresh water areas is usually the same water that the people living there use for drinking and washing. In April 1997, samples taken from water used for drinking and washing by local villagers were analysed in the United States. A sample from Luawii, in Ogoni, where there had been no oil production for four years, had 18 ppm of hydrocarbons in the water, 360 times the level allowed in drinking water in the European Union. A sample from from Ukpeleide, Ikwerre, contained 34 ppm, 680 times the European Union standard.[110]

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[107] See *Shell Petroleum Development Company limited v. Chief Enoch & Others*, [1992] 8 N.W.L.R. (Part 259) 335.

[108] See D. Iyalomhe, *supra* note 32 at 41

[109] See S. Kretzmann and S. Wright, *Human Rights and Environmental Information on the Royal Dutch/Shell Group of Companies, 1996 - 1997: An Independent Annual Report* (California: Rainforest Action Network and Project Underground, May 1997) 6; Human Rights Watch, *supra* note 1 at 67.

[110] Human Rights Watch, *supra* note 1 at 67. The report relies on S. Kretzmann and S. Wright, *ibid.*

In recent years, the oil producing areas have witnessed an upsurge in community disturbances and restiveness. These disturbances initially manifest in the form of peaceful protests by the communities against the apparent government neglect of the area and the environmentally devastating activities of the oil and gas companies. Soon, such peaceful protests turn deadly as a result of the repressive measures to quell the protests taken by the government sometimes at the invitation of the oil and gas companies. Although several of such repressive incidents exist, two of them - the Umuechen massacres and the Ogoni crisis- shall be briefly examined here to illustrate the complicity of the oil companies in the breach of the right to life in those communities.

i.i The Umuechen Massacres

Umuechen, an oil producing community, is located in Rivers State of Nigeria. On October 30 and 31, 1990, the community organised a protest against the corporate activities of Shell Petroleum Development Company Limited which they considered devastating to their environment and health. The community demanded that the government and oil companies operating in their land provide them with water, electricity, roads, and compensation for the contamination and pollution of their crops, creeks, streams, and rivers. In response, Shell invited the police to quell the protest. Through a letter dated October 29, 1990, written by Shell's divisional manager to the Rivers State Police Commissioner, Shell allegedly requested "security protection" and specifically demanded that paramilitary mobile police officers be sent to protect its installations and equipment against the protesters.[111]

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[111] Human Rights Watch, *supra* note 1 at 123. It is not surprising that Shell expressed preference for the para-military mobile police. That unit is an elite group within the Nigeria Police Force with a reputation for extreme brutality. Characteristically, Shell denies writing such a letter to the police.

Mobile police officers attacked the peaceful protesters on October 31, 1990. In the end, no fewer than 80 unarmed protesters including the traditional chief of the village were killed by the police. A judicial commission of inquiry set up by the Rivers State government to look into the incident found not only that there was no evidence of a threat by the villagers but also that the police acted in "reckless disregard for human lives and property."[112] Ironically however, no one was ever prosecuted for the killings.

i.ii The Ogoni Crisis

The prelude to the Ogoni crisis was the formation of the Movement for the Survival of Ogoni People (MOSOP) in 1990. That movement, formed by some educated Ogoni elite, sought, through what it called "Ogoni Bill of Rights" social, political, environmental and human rights redress from both the Nigerian government and the oil companies. It specifically accused Shell of being responsible for "the genocide of the Ogoni"[113] based on the devastating consequences of the corporate activities of Shell in Ogoni-land. In response to the agitations, protests and demands of MOSOP, the then military government embarked on a military campaign and crackdown in Ogoniland. It created a military outfit, otherwise called Rivers State Internal Security Task Force, to specifically deal with the agitations of the Ogonis. This military outfit is alleged to have violated the rights of the Ogonis including causing deaths, rape, torture and arson.[114] Events took a different turn in May 1994 when Ogoni youths allegedly murdered four Ogoni leaders whom they suspected of collaborating with the government and the oil companies. In response, the military government arrested the MOSOP leaders and consequently embarked on a military occupation of Ogoniland. Sixteen Ogoni leaders were thereafter tried in a military-style tribunal. Nine of those leaders, including the writer and environmental/human rights activist Ken Saro-Wiwa, were convicted and subsequently executed by hanging in 1995. The trial was against all known tenets of the rule of law and fair hearing.[115]

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[112] See Rivers State Government, *Report of the Judicial Commission of Inquiry into the Umuechen Disturbances* (Port - Harcourt: Rivers State Government).

[113] K. Saro-Wiwa, *Genocide in Nigeria: The Ogoni Tragedy* (Port-Harcourt: Saros, 1992) at 81.

[114] Human Rights Watch/Africa, *The Ogoni Crisis* (New York: Human Rights Watch, 1995). See also, Human Rights Watch, *supra* note 1 at 125; Civil Liberties Organisation, *Ogoni: Trials and Travails* (Lagos: Civil Liberties Organisation, 1996); S. Nolen, *supra* note 2.

It is not worthy that Shell actively participated in the trial of the Ogoni leaders. It hired the services of a top Nigerian lawyer who represented it (on a 'watching brief') at the tribunal throughout the trial. Shell did not protest to the government about the numerous irregularities apparent in the trial despite the fact that it witnessed first hand, through its counsel, those irregularities. Indeed, Shell's role in that trial raises serious legal questions considering that the Ogonis had, before then, accused it of the 'genocide of the Ogoni.'[116] As one human rights group has asked: "What was Shell's interest in the trial? What interest was Shell watching and protecting?"[117]

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[115] The Ogoni leaders, now popularly referred to as 'Ogoni Nine' were tried and convicted under the *Civil Disturbances (Special Tribunal) Decree* No. 2 of 1987, a Decree promulgated by the military government. Under that Decree, the military Head of State of Nigeria had draconian powers. Section 2 of the Decree empowered him to constitute a special tribunal to try anyone recommended for trial under the Decree while s. 3(3) vested him with powers to create new offences for the purpose of the Decree. He also had the powers to appoint members of the tribunal some of whom may be serving military personnel. The tribunal's findings, decision, conviction or sentence were not appealable. To cap it all, s. 8 of the Decree excluded the right to question anything done by the tribunal in the regular courts. That section provided thus: "The validity of any decision, sentence, judgement, confirmation, direction, notice or order given or made, as the case may be, or any other thing whatsoever done under this Decree shall not be enquired into in any court of law." For a detailed account of the trial and conviction of the Ogoni Nine, see Civil Liberties Organisation, *Ogoni: Trials and Travails, ibid.*

[116] Indeed, Professor Claude Ake, a member of Shell's Advisory Committee on Environmental Impact Assessment specifically accused Shell of causing the crisis in Ogoni-land. Professor Ake, upon his resignation from that committee to protest against Shell's perceived role in the Ogoni conflict, stated that "Shell Petroleum Development Company of Nigeria shows no sign of remorse for causing the strife in Ogoniland which has thrown Nigeria into one of the deepest crises of its history." See C. Ake, "Shelling Nigeria Ablaze" *Tell Magazine* (29 January, 1996) at 34. For an electronic publication of that article, see online *COHDN News, "Oil, Shell and Nigeria"* <http://www.cohdn.ca/news > date accessed: 14 October, 2001.

The military occupation of Ogoniland lasted until very recently leaving in its wake numerous instances of human rights violations ranging from extra-judicial killings, rape, torture, and destruction of property.[118]

The Umuechen massacres and the Ogoni crisis illustrate how the threat to human life can become immediate. While the oil and gas companies are not directly responsible for the massacre and crisis in Umuechen and Ogoni, it is nevertheless considered a breach of social responsibility for the companies to specifically request, as was the case in Umuechen, for the services of paramilitary mobile police (renowned for their brutality) to quell peaceful protests against their corporate activities or to make no protest to the government in the face of apparent evidence of the suppression of human rights.

ii. The Rights to Health and Healthy Environment

As we have seen, several terminal diseases such as cancer, respiratory disorder, asthma, and birth deformities common in the oil and gas producing areas of Nigeria have been linked to oil-related pollution and contamination of drinking water in the area.[119] Such diseases might be contracted not only by drinking contaminated water but also by eating contaminated aquatic creatures.

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[117] Civil Liberties Organisation, *Ogoni: Trials and Travails, supra* note 114 at 104.

[118] This can be cleaned from the fact that 8,000 of the 9,860 petitions submitted to the Nigerian Human Rights Investigation Commission set up by the present democratically elected government in the country to examine cases of human rights violations in Nigeria from 1966 to 1999, came from Ogoniland alone. See, *The [Nigeria] Vanguard* Newspaper (18 October, 2000) online <http://www.vanguardngr.com > date accessed: 18 October, 2000.

[119] See D. Iyalomhe, *supra* note 32 at 41. See also, D. A. Love, "Shell Oil Disregards Human Rights in Nigeria" Online <http://www.progressive.org > date accessed: 14 October, 2001.

The right to a healthy environment, which is apparently rooted in the right to life, is general in nature. Implicit in the right are the corollary rights to be safe from harmful exposure, protection and enforcement of environmental laws, the right to know what kinds of harmful chemicals or substances one's environment is being subjected to, the right to expeditious clean-up in the case of pollution, right to prevention of environmental hazards, that is, the right to insist on preventive measures being put in place before natural resources are exploited, the right to participate in the design and implementation of projects that are likely to result in environmental hazards and the right to adequate compensation for environmental damage.[120] Although these rights are not expressly provided for under the Nigerian *Constitution*,[121] they are, nevertheless, recognised and provided for under the *African Charter on Human and Peoples' Rights.*[122]

Nigeria is not only a party and signatory to the African Charter but has incorporated same into the *corpus juris* of her domestic laws through the *African Charter (Ratification*

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[120] W. Ncube, J. Mohamed-Katerere & M. Chenje, "Towards the Constitutional Protection of Environmental Rights in Zimbabwe" (1996) 13 Zimbabwe Law Rev. 97 at 101.

[121] Section 17(3)(c) of the *1999 Constitution* which falls within Chapter II of the *Constitution* titled 'Fundamental Objectives and Directive Principles of State Policy' merely enjoin the state to direct its policy towards ensuring that the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused. It is clear from the wordings of the section that it is directed at the safety of those in employment, that is workers. Besides, the potency of that provision is completely eliminated or at least diluted by the fact that the whole of Chapter II of the *Constitution* of which s. 17 forms a part is non-justiciable in the law court as provided under s. 6(6)(c) of the *Constitution*. See s. 17(3)(c) of the *1979 Constitution* for an identical provision.

[122] See *African Charter on Human and Peoples' Rights, supra* note 99, Articles 16 (right to health) & 24 (right to a satisfactory environment).

and Enforcement) Act, 1983.[123] Therefore, the provisions of the African Charter are now part of the domestic laws of Nigeria.[124] Consequently, the Charter has a binding force of law in Nigeria. As the Supreme Court of Nigeria has held, Nigerian courts must give effect to it like all other laws falling within the judicial powers of the courts.[125]

The result is that those rights are statutorily guaranteed in Nigeria. It is the view of the author that hazardous environmental consequences of oil operations which result in a substantial reduction in the quality of health of the people of the oil and gas producing areas or of their environment is a negation of the letter and spirit of those guaranteed rights. Therefore, it is open to argument that oil and gas companies, whose corporate activities have resulted in such reduced state of health or environment for the people have breached those rights in contravention of the African Charter.

iii. Other Constitutionally Guaranteed Rights

The Nigerian *Constitution* guarantees to every individual the right to the dignity of his or her person and accordingly, no person shall be subjected to torture or to inhuman and degrading treatment.[126] In the same vein, every person is entitled, under the Constitution, to his or her personal liberty and no one shall be deprived of such liberty save in the circumstances prescribed under that *Constitution* and in accordance with the procedure permitted by law.[127]

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[123] Now Cap. 10, Laws of the Federation of Nigeria, 1990.

[124] See *General Sani Abacha & Others v. Chief Gani Fawehinmi*, [2000] S. C. (Part 2) 1.

[125] *Ibid.*

[126] The *1999 Constitution*, s. 34(1)(a). See also the *1979 Constitution*, s. 31(1) for a similar provision.

The Nigerian delta is the most economically endowed region of the country. Ironically however, it is about the least developed in terms of infrastructure and social amenities. Roads, schools, hospitals, portable water, electricity and all other social amenities that would make for a good life are either completely lacking or where they exist at all, are in dilapidated and neglected state. On daily basis, the people are witnesses to the flurry of oil exploration and exploitation activities going on in their land. With the general downturn in the country's economy coupled with the attendant unemployment crisis currently ravaging the country, community agitation against the oil and gas companies and the government have become rampart. These agitations take the form of protests against the companies and demands that they spend part of their profits on the provision of basic infrastructure for the people.[128]

A new twist now appear to have been added to such agitations. In the recent past, armies of youth have emerged in the area. These youths, often educated, are unemployed. Being aware of the commercial value of the crude oil extracted from their land and perceiving the government and the oil and gas companies as being reluctant or indifferent to minimize and or redress environmental hazards associated with their oil-related activities in the area, the youths sometimes resort to disruption of oil production activities in search of a better deal for their people.[129] Despite this trend, the government and the oil and gas companies remain indifferent to the plight of the indigenes of the oil producing communities. The result is that today, community protests and youth restiveness have become a common feature in the area.

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[127] The *1999 Constitution*, s. 35. Section 32 of the *1979 Constitution* contained a similar provision.

[128] The formation of the Movement for the Survival of Ogoni People (MOSOP) in 1990 by some educated elite of Ogoni extraction with the principal aim of seeking redress for the negative impact of oil production activities on their land marked the first attempt to articulate the grievances and demands of the communities in an elaborate manner. The main grouse of the movement was, as articulated in the Ogoni Charter of Demands, that since oil production began in Ogoni land in 1958 earning for Shell and the Nigerian government an estimated 30 billion U.S Dollars, the communities from which those earnings were made have not benefited but instead have been left with degraded land, decimated wild life, polluted rivers and creeks and a polluted environment from gas flares and oil spills. See Constitutional Rights Project, *supra* note 22 at 23 - 24.

The government, with no apparent - or at least no public - objection by the oil companies, has adopted and continues to adopt repressive measures in quelling such protests and restiveness which are, in the main, peaceful. Indeed, in some cases, the oil companies play a supportive role (such as by the provision of transportation facilities and finance to the security forces[130]) in such repressive measures. These measures, ranging from arrest, detention without trial, torture, rape, destruction of property and death, violate the constitutionally guaranteed rights of the people. In Umuechen for example, aside from the human fatalities, 495 houses were destroyed by the security forces during the raid on the community. Several Ogoni women were raped by officers of the security forces during the Ogoni crisis.[131]

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[129] Constitutional Rights Project, *supra* note 22 at 25. It need however be pointed out that in some extreme but rare cases, some of these youth armies have abducted foreign expatriates staff of the oil and gas companies in desperate attempt to ensure that their demands are met.

[130] As admitted by Chevron, it transported Nigerian security personnel in its helicopters using its pilots to Parabe oil platform in May, 1998. Two protesters were shot dead in that oil platform by the security personnel. See, *infra* notes 142 & 143. Shell admits that it financed and purchased some Berretta pistols in 1989 for the Nigeria Police Force officers guarding its facilities. See, *SPDC's Submission to the Human Rights Violations Commission of Nigeria, infra* note 140. Shell also admits that in 1995, it conducted negotiations on behalf of the Nigeria Police Force for the importation of arms into the country (*infra* note 139) and that it made "a very small fixed field allowance" to security personnel protecting its facilities. See, *infra* note 138.

[131] At least, seven such women recently testified before the Human Rights Violations Investigation Commission confirming that they were raped. One of the women, Mrs. Lebrie Gbara, testified that in addition to being raped, her husband and her two children who had tried to save her from being raped were shot dead by soldiers attached to the Rivers State internal security task force. See M. Ogunsakin and J. Ollor-Obari, "In Hoods, Ogoni Women Relive Rape Scenes", *The [Nigeria] Guardian* Newspaper (27 January, 2001) online < http://www.ngrguardiannews.com > date accessed: 27 January, 2001.

Admittedly, whilst the oil companies did not directly take part in the raids and the subsequent rights violations, some of the companies financed, at least in part, the activities of the security forces.[132] I shall, at this juncture, proceed to examine the specifics of the complicity of the oil companies in human rights violations in Nigeria's oil producing communities.

c. Whither Corporate Responsibility: Complicity of the Oil Companies in Human Rights Violations in Nigeria's Oil Producing Communities

An obvious question need be asked at this stage - How are the oil companies involved in the perpetuation of the repressive measures mentioned above? To an outsider, the answer would appear far fetched. Indeed, the connecting nexus between the corporate activities of the oil companies in Nigeria's oil producing communities and human rights violations therein is, often times, obscure and therefore difficult to see.[133] However, to those conversant with the nature of the contractual arrangements between the Nigerian government and the oil companies, the answer to the question posed above is not difficult to fathom. Evidence abounds to show that multinational oil companies sometimes play a role in the violation of human rights in Nigeria.

As we have seen, all major oil companies operating in Nigeria have joint venture agreements with the government and their corporate activities are carried out as such. These joint ventures are governed by the terms of the Memorandum of Understanding (MOU) or the Joint Operations Agreement (JOA). These MOUs and JOAs contain security clause(s) which imposes an obligation on the oil companies to report any perceived threat to oil production to the government. Although the details of such clause(s) have never been made public by both the government and the oil companies, observers believe that the secrecy surrounding the clause(s) is necessitated by the desire, on the part of both the government and the oil companies, to shield the oil companies from being exposed for their complicity in human rights violations in that region of the country. All too often, as was the case in Umuechen, oil companies, apparently relying on such security clause(s), invite law enforcement agents to quell protests most of which are largely peaceful. The oil companies seem emboldened by such security arrangements but as we have seen, the invitation extended by the oil companies to the security forces almost always have a predictable outcome: loss of lives and property and violations of the fundamental rights of the people.

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[132] See *infra* notes 138 - 142.

[133] Commenting on a similar situation in the Sudan, Amnesty International points out that the multinational "companies are responsible for the way the local community is treated as a result of their operations" and notes that "oil exploration may be used as justification for the forcible displacement of local populations by security forces through human rights violations". See Amnesty International, "Sudan: The Human Price of Oil", Online <http://www.amnesty.org > date accessed: 23 June, 2001.

All the major oil companies operating in the country have 'supernumerary police' in their employ.[134] Although recruited and trained by the Nigeria Police Force, the supernumerary police receive their salaries from the oil companies. These police officers are ordinarily subject to the command structure of the Nigeria Police Force but the oil companies determine where they are to be deployed.[135]Some of the human rights violations in the oil producing communities have been alleged to have been carried out by these police officers who, to all intents and purposes, are employees of the oil companies.[136]

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[134] See *SPDC's Submission to the Human Rights Violations Investigation Commission of Nigeria* dated January 23, 2001. Shell admitted in that submission that it has Supernumerary Police claiming that "the use of Supernumerary Police is common practice in large organisations in Nigeria." For the full text of that Submission, see SPDC Online <http://www.shellnigeria.com/frame.asp?Page=news > date accessed: 26 September, 2001.

[135] Human Rights Watch, *supra* note 1 at 115 - 116.

Apart from the security arrangements depicted above, special security units were, in the recent past, created by the then military government in Nigeria supposedly to protect oil installations.[137] Of these special security units, perhaps the most notorious, principally because of its reputation for brutality, was the Rivers State Internal Security Task Force made up of a combination of personnel from the army, navy and the police force. These military task forces were involved in a number of human rights violations in the oil producing communities.

Evidence exists to suggest that the oil companies funded, at least in part, the activities of these military task forces. Shell, for example, admits that it made direct payments to the Nigerian security forces in the form of what it termed "a very small fixed field allowance" in cases where members of the security forces have been deployed in connection with the protection of its facilities and personnel.[138]

Indeed, some of the oil companies have actively participated in the importation of arms and weapons for use by the Nigeria Police Force. Again Shell appear to be the biggest culprit in this regard. Shell admits that in 1995 it conducted negotiations for the importation of weapons such as Berretta semi-automatic rifles, pump action shotguns and tear gas into

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[136] S. Kretzmann and S. Wright, *supra* note 109 at 11. As that report indicate, two of the twenty people arrested, detained and tried in a military tribunal in respect of the Ogoni crisis, Blessing Isreal and Kagbara Baseeh, alleged that Shell police had a direct role in their arrest and torture.

[137] These Special Military Task Forces have now been disbanded as a result the return to civil rule in the country on May 29, 1999.

[138] Human Rights Watch, *supra* note 1 at 170. Shell is also alleged to make continuous payments to soldiers at its sites in the Niger delta. See, Environmental Rights Action, "Shell in the Niger Delta 1997/98:A Brief Report to Sierra Club, USA from E.R.A, Benin City, Nigeria", May 1998. Shell has however refuted this allegation. See, "Osubi Airport Project: Shell Nigeria's Response to Allegations by E.R.A." Shell Petroleum Development Company press release, March 23, 1998.

Nigeria on behalf of the Nigeria Police Force.[139] Only recently, a top official of Shell again admitted that "Shell did finance and purchased some Berretta pistols in 1989 for the exclusive use of the members of the Nigeria Police Force assigned to Shell Petroleum Development Company, who were duly authorised to bear arms."[140] If Shell is as corporately responsible as it has often claimed, the question is: why would it, being a private corporation, be involved in the purchase of arms and or negotiation for the importation of arms for the Nigeria Police Force which, to the knowledge of Shell, has often times engaged in the brutal violations of the fundamental rights of Nigerians?.

Evidence also exist to show that during the last military regime in Nigeria, there was a close collaboration between the oil companies and the military government especially the military task forces. Human Rights Watch reports that:

> a leaked memorandum, dated May 12, 1994, addressed to the governor of Rivers State and signed by Lt. Col. Paul Okuntimo, head of the Rivers State Internal Security Task Force stated: "Shell operations still impossible unless ruthless military operations are undertaken for smooth economic activities to commence." The strategies proposed include "wasting operations during MOSOP and other gatherings, making constant military presence justifiable"; "wasting targets cutting across communities and leadership cadres,

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[139] See P. Ghazi & C. Duodu, "How Shell Tried to Buy Berrettas for Nigerians," *The [London] Observer*, February 11, 1996. This fact first came to light in *Humanitex Nigeria Ltd. v. Shell Ptroleum Development Company Ltd*, Suit No. FHC/L/CS/849/95, a case in which the plaintiff company, an arms dealer, sued Shell at the Federal High Court, Lagos, Nigeria, for breach of contract in relation to the importation of the said arms and weapons. In a 17-paragraph affidavit sworn to by the plaintiff's Chief Executive Officer, the plaintiff averred that Shell was making the purchase so as to update the firearms of its security forces across the country.

[140] E. U. Imomoh, Deputy Managing Director, Shell Petroleum Development Company (SPDC) Limited, in *SPDC's Submission to the Human Rights Violations Investigation Commission of Nigeria* dated January 23, 2001, online <http://www.shellnigeria.com/frame.asp?Page=news > date accessed: 26 September, 2001. See also, J. Ollor-Obari & M. Ogunsakin, "Peace at Last in Ogoniland" *The [Nigeria] Guardian* Newspaper (4 February, 2001) online < http://ngrguardiannews.com > date accessed: 4 February, 2001; I. O. Ige & S. Onwuemeodo, "Oputa: Why Shell Can't Provide Amenities in Niger-Delta" *The Vanguard [Nigeria]* Newspaper (2 February, 2001) online < http://www.vanguardngr.com > date accessed: 2 February, 2001.

> especially vocal individuals in various groups", and "restriction of unuathorised visitors, especially those from Europe, to Ogoni." An "initial disbursement of 50 million naira" and "pressure on oil companies for prompt regular imputs" were requested.[141]

This memorandum, in and of itself, laid bare the fact that oil companies collaborated with and indeed funded the activities of these military task forces which, in the main, engaged in brutal violations of the human rights of the people. Such collaboration is epitomised by an incident which occurred at Chevron's Parabe Platform in May, 1998. Unarmed youths had staged a protest at the said platform against the corporate activities of Chevron which they considered devastating to their environment and health. Chevron, in response, called in the navy and mobile police. Indeed, the naval and police officers were flown to the scene of the protest by Chevron in its helicopters. Predictably, in the end, two of the protesters were shot dead.[142] Chevron, while alleging that the protesters were kidnappers, denied complicity in the death of the two protesters. In a statement, the company stated:

> Because Nigerian law enforcement officials lack helicopter transportation and expertise to land on offshore platforms, law enforcement officials required that the joint venture provide helicopters to transport officers to the facility. When they arrived on the platform, the law officers announced their intention to evacuate the platform without arresting anyone. A protester attempted to seize a weapon of one of the officers, leading to a scuffle, during which two of the kidnappers died of gunshot wounds and another was injured.[143]

d. Oil Companies' Response to Allegations of Corporate Irresponsibility

Whilst some of the oil and gas companies have acknowledged that some aspects of their operations have attracted adverse attention,[144] none of the oil companies, to the knowledge of the author, has ever admitted complicity in human rights violations in Nigeria. On the contrary, the companies have claimed that they do business as responsible corporate members of society. Shell, for example, claims that in the conduct of its business it "observes the laws of Nigeria and respects the fundamental human rights of members of society."[145] Shell goes on to state that as a practice, it "ensures that the police personnel assigned to our operations abide by a written code of conduct that respects Fundamental Human Rights in line with the U.N. Declaration of Human Rights."[146] In similar vein, Chevron Corporation states that it conducts its business placing emphasis on "ethical corporate citizenship to the benefit of our employees, partners, neighbors and stockholders"[147] while it "practices environmental protection in every aspect of its activities" and "employs the highest environmental standards throughout its worldwide operations."[148]

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[141] *Supra* note 1 at 169.

[142] *Ibid* at 179.

[143] *Chevron's Statement Regarding Seizure of Nigerian Parabe Offshore Platform*, online <http://www.chevron.com/newsvs/currentissues/nigeria_parabe/> date accessed: 26 September, 2001.

Virtually all the oil companies maintain that their corporate policies and practices emphasize safe operations and pollution prevention. Available facts and statistics do not however support the claim of adherence by the companies to their stated corporate policy thrust. Gas flaring or the funding of brutal security forces are inconsistent with pollution prevention or safe operations .

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[144] See R. M. Van Den Berg, *supra* note 51.

[145] *SPDC's Submission to the Human Rights Violations Investigation of Nigeria*, dated January 23, 2001, *supra* note 138.

[146] *Ibid.*

[147] *Chevron Nigeria's Commitment*, online < http://www.chevron.com/newsvs/currentissues/nigeria_parabe/ > date accessed: 26 September, 2001.

[148] Chevron, *Protecting the Environment*, online <http://www.chevron.com/newsvs/currentissues/nigeria_parabe/ > date accessed: 26 September, 2001.

e. Developmental Benefits from the Oil and Gas Companies

Although this thesis, in the main, focusses on the negative externalities of oil operations in Nigeria in relation to the environment and human rights of the oil and gas producing communities, it nevertheless recognises and appreciates the tremendous contributions which the oil and gas companies have made, and continues to make, to the economic well-being of Nigeria. As I mentioned earlier, oil is the main-stay of the Nigerian economy. It is perhaps correct to state that but for the multinational oil and gas companies and their expertise in oil exploration and production, the Nigerian economy would not have developed to the stage it is today. At the moment, Nigeria lack enough indigenous experts to adequately explore and produce oil and gas in the country.

Even the oil and gas producing communities have received tremendous contributions from the oil companies in the form of provision of essential infra-structural amenities and services such as roads, schools, hospitals, and scholarships.[149] Shell, for example, claims that its community assistance has risen steadily over the years from U.S.$330,000 in 1989 to U.S.$7.5 million in 1993 and to more than U.S.$36 million in 1996.[150] In 1999, the company claimed to have spent U.S.$52 million on its community development programme in the oil producing communities.[151] However, in the absence of an independent verification of these claims, local community residents doubt the accuracy of the figures. Besides, some independent observers have noted that much of the money voted by the oil companies for community development projects is spent on wasteful and irrelevant projects.[152] In fact, *The Economist* reports that an independent report commissioned by Shell determined that fewer than 1/3 of Shell's local development projects were successful.[153] The said independent report has, regrettably, not been made public.[154]

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[149] See, for example, Chevron online <http://www.chevron.com/news/currentissues/nigeria_parabe/ > date accessed: 26 September, 2001. See also, Shell Petroleum Development Company Nigeria Limited online <http://www.shellnigeria.com/frame.asp?Page=news > date accessed: 26 September, 2001.

[150] SPDC, *Page Fact Book 1993*; s. 6.6, SPDC, *People and Environment: Annual Report 1996.*

[151] SPDC, *People and Environment: Annual Report 1999.*

The recurring issue of complicity by the oil and gas companies in the environmental and human rights crisis in the oil and gas producing communities would however appear to have eclipsed the benefits the Nigerian economy and peoples have derived from those companies.

IV. Conclusion

The aim of this chapter was to establish, on the basis of empirical evidence, that there is a causal connection between the corporate activities of oil and gas companies in Nigeria and the environmental and human rights crisis in Nigeria's oil and gas producing communities. In doing so, the chapter attempted to evaluate the corporate responsibility of the oil and gas companies by placing reliance on their environmental and human rights practices. It concluded that oil companies in Nigeria have not been corporately responsible in the conduct of their corporate activities as they seem to focus on profits at the expense of reducing the negative externalities of their corporate activities.

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[152] Human Rights Watch, *supra* note 1 at 105.

[153] *The Economist* (May 12, 2001) at 52.

[154] *Ibid.*

Whilst it is conceded that the oil and gas companies operating in Nigeria are in business to make a profit, such profit ought not to be made at the expense of the public. It is the social responsibility of the companies to ensure that the negative effects of their corporate activities are minimized and, if possible, eliminated. As asserted in chapter 1, companies ought to concentrate on 'profit optimization' rather than 'profit maximization.' That way, the interests of both the companies' shareholders (a fair return on investment) and the public (protection from harmful effects of corporate activity) is catered for simultaneously.

CHAPTER 3

REMEDYING THE CRISIS FROM WITHIN: TOWARDS THE PROMOTION OF CORPORATE RESPONSIBILITY IN NIGERIA

I. Introduction

As discussed in Chapter 2, the oil and gas companies are partly responsible for the environmental and human rights crisis in Nigeria's oil and gas producing communities. Oil companies in Nigeria seem to focus mainly on the profits derivable from their corporate activities while ignoring, in the process, negative externalities resulting therefrom.[1] The Nigerian company law statute, that is, the *Companies and Allied Matters Act*[2] (hereinafter "the CAMA") appears to aid the companies, albeit by default, in the practice of corporate irresponsibility.

This chapter seeks, in the main, to proffer solutions to the crisis in Nigeria's oil and gas producing communities by focussing on how corporations can be made or encouraged to be good corporate citizens. The chapter is divided into several parts. Part II provides some context by examining corporate social responsibility under current Nigerian law. It concludes that the CAMA, as it is presently, does not contain adequate provisions for ensuring corporate responsibility in Nigeria. Part III offers some suggestions as to how the CAMA corporate responsibility provisions and mechanism could be enhanced, through amendment, so as to ensure corporate responsibility in Nigeria. It suggests that the crisis in the oil and gas producing communities may be remedied either by (1) strengthening the Corporate Affairs Commission so as to make it independent and efficient; (2) enlarging corporate directors' duties under the CAMA to include a duty owed to the host communities and those host communities should, in turn, be granted a legal right to sue the company and or the directors to compel compliance with the enlarged duty or for the breach of same; (3) restructuring the nature and composition of the corporate boards of large public companies in Nigeria to include representatives of non-shareholder constituencies. Part IV examines the provisions of the *Constitution of the Federal Republic of Nigeria 1999* (hereinafter "the *Constitution*")[3] as underlying basis for corporate social responsibility in Nigeria and argues that the reforms suggested here are, in fact, a constitutional necessity. Because a corporation's will to act in a socially responsible way is important to the operational success of the proposed reforms and beyond, Part V stresses the need for the oil and gas companies in Nigeria to evolve and adopt self regulatory techniques in the conduct of their corporate business.

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[1] In effect, the oil and gas companies have, to a very large extent, failed to practice corporate responsibility in their dealings with the communities. As discussed in Chapter 2, all major multinational oil companies in Nigeria have consistently flared gas despite laws prohibiting gas flaring in the country. Oil spillages in Nigeria are, in the main, caused by equipment failure or malfunction. Most of the oil pipelines were constructed between the 1960s and the early 1980s. The oil companies have neglected and or refused to replace or at least renovate them as that would involve huge capital expenses which, in turn, would translate into a reduction of corporate profits albeit in the short term. Between 1976 and 1979, for example, 92% of the net volume of oil spills in Nigeria were caused by equipment failure. See A.E. Ogbuigwe, "Compensation and Liability for Oil Pollution in Nigeria" (1985) 3 J. PPL 21 - 23. See also, J. G. Frynas, *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities* (Hamburg: LIT VERTAG Munster, 2000) at 165 - 166; C. N. Ifeadi and J.N Nwankwo, "Critical Analysis of Oil Spill Incidents in Nigerian Petroleum Industry" in *The Petroleum Industry and the Nigerian Environment* (Lagos: Federal Ministry of Housing and Environment, 1987) 104 at 108 - 109.

[2] Cap. 59, Laws of the Federation of Nigeria, 1990

II. Corporate Social Responsibility in Nigeria

As mentioned in Chapter 1, the Nigerian law presents an interesting dimension to the corporate social responsibility concept. While some statutory enactments in Nigeria[4] encompass the concept, the *Constitution* of the country provides a constitutional basis for advocating corporate responsibility in Nigeria. I shall return to this later in the Chapter.

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[3] *Constitution of the Federal Republic of Nigeria, 1999.*

a. The Companies and Allied Matters Act

(i) Whose Interests are Company Directors Entitled to Consider?

Section 279(4) of the CAMA [5] provide thus :

> The matters to which the director of a company is to have regard in the performance of his functions include the interests of the company's employees in general, as well as the interests of its members.

Section 279(4) poses some interpretational ambiguity. Based on its wordings, that subsection would appear to be susceptible to two possible interpretations. One, it could be read simply as meaning that the matters to which directors are to have regard in discharging their duties are not exhaustive. This is because of the use of the word 'includes' in that subsection. Under this interpretation, directors may consider other matters such as the interests of other corporate constituencies in addition to the interests of the company's employees and members. That being the case, directors would be perfectly justified in having regard to the interests of the company's host community(ies) when making corporate management decisions. This interpretation is however weakened by the fact that directors' duties are not at large, and are only exercisable within a prescribed compass since those duties are fiduciary in nature.[6] Thus, the duties are exercised within permissible limits and for the permitted purpose. I shall return to this shortly.

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[4] See, for example, *Education Tax Act,* which imposes an obligation on some companies to contribute financially to the Nigerian Education Tax Fund which money is, in turn, used to fund education in Nigeria.

[5] Section 279(4) of the CAMA is a replica of s. 309(1) of the United Kingdom *Companies Act 1985.*

[6] See CBCA s. 122(1); ABCA s. 177(1), CAMA s. 279(1),(2)&(3).

A second interpretation is that directors are empowered by that subsection to consider only the interests of the corporate constituencies specifically mentioned therein. Consequently, directors can only consider the interests of the company's employees and members.

To the best of my knowledge, there is no Nigerian caselaw authority on the proper interpretation of s. 279(4) of the CAMA. That subsection is an exact replica of s. 309(1) of the U.K. *Companies Act, 1985.* Consequently, I shall rely on English caselaw in an attempt to ascertain the proper meaning of s. 279(4) of the CAMA and conclude that the second meaning discussed above is likely the correct one.

Under the corporate laws of Nigeria, Canada and the United Kingdom, company directors have a duty to act at all times in the best interests of the company as a whole.[7] Indeed, that duty can only be exercised by the directors for a proper purpose.[8] The exercise of directors powers for a purpose other than that which is in the best interest of the company amounts to a breach of the directors' fiduciary duty to the company.[9]

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[7] See CAMA s. 279(3), CBCA s. 122(1). See also, *Piercy v. Mills & Co.*, [1920] Ch. 77; *Hogg v. Cramphorn Ltd,* [1966] 3 All ER 420.

[8] *Howard Smith Ltd v. Ampol Petroleum Ltd,* [1974] AC 821; *Lee Panavision Ltd v. Lee Lighting Ltd,* [1992] BCLC 22.

[9] *Lee Panavision Ltd v. Lee Lighting Ltd, ibid.* In that case, the directors of the defendant company, who had been nominated by the plaintiffs under a management agreement, executed a second management agreement just before the expiration of the first agreement. They did so to retain control of the defendant company so as to ensure that it paid an outstanding debt it owed to another company in which the plaintiffs had an interest. The new shareholders of the defendant company, upon the expiration of the first management agreement, removed the directors and renounced the second management agreement. The English court held that although the directors had the powers to enter into the second management agreement, they exercised that power for an improper purpose (that is, the payment of the outstanding debt to the company in which the plaintiffs had an interest) since they knew that the new shareholders were opposed to the second agreement.

These principles have been upheld by the English courts both before and after the enactment of the U. K. *Companies Act, 1985.*[10] In *Hogg v. Cramphorn,*[11] for example, the directors of a company, in an attempt to prevent a take-over bid which they genuinely believed would not be in the interest of the company and its employees, decided to issue new shares with special voting rights to the employees pension fund so that the trustees of that fund could purchase those shares and support the directors in their desire to prevent the take-over. It was held that the directors were in breach of their duties because the power to allot shares was used by them not for the benefit of the company but for an improper purpose, that is, the directors desire to prevent the take-over bid. A similar conclusion was reached in *Alexander v. Automatic Telephone Co.*[12]

Although the *Hogg* case was decided before the enactment of the U.K *Companies Act, 1985*, it is still good law in England.[13] It would seem to suggest, along with cases such as *Lee Panavision Ltd. v. Lee Lighting Ltd.*[14] and *Alexander v. Automatic Telephone Co.*[15]

Consequently, in entering into the second management agreement, the directors breached their fiduciary duty to the company.

[10] See *Hogg v. Cramphorn Ltd, supra* note 7; *Alexander v. Automatic Telephone Co.*, [1990] 2 Ch 56.

[11] *Supra* note 7. Note that in *Tech Corp. v. Miller* (1973), 33 D.L.R. (3d) 299 (B.C.S.C.), the British Columbia Supreme Court refused to follow *Hogg v. Cramphorn*. It held that an agreement by directors to issue shares so as to prevent a majority shareholder from taking control of the corporation does not amount to a breach of the directors' fiduciary duty as long as they act in good faith in the belief, on reasonable grounds, that doing so is in the best interest of the corporation.

[12] *Supra* note 10.

[13] Cases decided after the enactment of the U.K. *Companies Act* 1985 restates the position in *Hogg*. See *Alexander v. Automatic telephone Co., supra* note 10; *Lee Panavision Ltd. v. Lee Lighting Ltd, supra* note 8.

[14] *Supra* note 8.

[15] *Supra* note 10.

which were decided after the enactment of the Act, that directors must exercise their powers only for the benefit of the company and not to consider interests outside those specifically mentioned in s. 309(1) of the U.K *Companies Act*. It follows that the consideration of the interests of any constituency not specifically mentioned in s. 309(1) of the U.K. *Companies Act* or s. 279(4) of the CAMA would amount to an exercise of directors powers for an improper purpose.

Section 279(5) of the CAMA gives added vent to the view that s. 279(4) does not permit the directors to have regards, in the corporate decision making process, to the interests of corporate constituencies other than those of the company's employees and members. That subsection provides:

> *A director shall exercise his powers for the purpose for which it is specified and shall not do so for a collateral purpose,* and the power, if exercised for the right purpose does not constitute a breach of duty, if it, incidentally, affects a member adversely. (Emphasis added.)

The consideration of the interests of corporate constituencies not mentioned in s. 279(4) CAMA by the directors would, in my view, amount to using the directors powers not only for a purpose for which the power is not specified, but also a collateral purpose which is specifically prohibited by s. 279(5). Thus, it is submitted that s. 279(4) of the CAMA would almost invariably restrict the directors to have regards only to the interests of the company's employees and members in making corporate decisions.

That said, there may well be circumstances where it is in the best interests of the corporation that outside interests be considered. Although the term 'best interest of the company' has been traditionally held by common law courts to mean 'interests of the shareholders'[16] it is possible to argue that the term 'interests of the company' is not necessarily synonymous with 'shareholder- gain' as it may also include the interests of other corporate constituencies such as creditors.[17]

The reality, however, is that directors would likely feel vulnerable in giving much weight to outside interests absent tremendously clear circumstance(s) and express statutory wordings permitting them to do so.

ii. Enforcement of s. 279(4) of the CAMA

Not only is the CAMA weak for not expressly empowering directors to consider community interests, it does not appear to place any enforcement mechanism in the hands of a group whose interests it permits the directors to consider, namely the employees. Employees do not have the *locus standi* to sue the directors to compel compliance with s. 279(4) of the CAMA or for breach of that subsection. This is because, by virtue of s. 279(9) of the CAMA, any duty imposed on a director under s. 279 can only be enforced "against the director by the **company**."[18] This subsection appears to be premised on the fact the directors owe a fiduciary duty only to the company[19] and to no other. It also appears to be a restatement (or at least an attempt to do so) of the rule in *Foss v. Harbottle*.[20] Simply put, that rule stipulates that when a wrong is alleged to have been done to a company, only the company is competent to institute an action in relation thereto. The *Foss v. Harbottle* rule is only justifiable if the alleged wrong is one done to the company. Directors' refusal to consider the interests of employees is arguably not a wrong done to the company but to the employees. Therefore, in the interest of fairness and clarity, the CAMA ought to have granted employees the express right to sue to enforce compliance with s. 279(4).

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[16] See L.C.B. Gower, *Gower's Principles of Modern Company Law*, 5th ed. (London: Sweet & Mwxwell,1992) 551, 554-5.

[17] It is noteworthy that courts in Commonwealth countries have held, beginning with the Australian case of *Walker* v. *Wimborne* (1976), 50 ALJR 446, 449 that "best interests of the company"is not restricted to shareholder interests but include creditors' interests. In fact, where the company is insolvent or close to insolvency or if a proposed corporate action will jeopardize the company's solvency, the interests of the creditors is pre-eminent and takes precedence over those of the shareholders. See J. S. Ziegel, "Creditors as Corporate Stakeholders: The Anglo-Canadian Perspective" (1993) 43 UTLR 511.

[18] Emphasis added. See also s. 309(2) of the United Kingdom *Companies Act*, 1985 for a similar provision. Commenting on that subsection of the U.K. *Companies Act*, some learned authors have asserted that "this must mean that the duty to consider the interests of the employees is not owed to, and is not enforceable by, the employees themselves." See S. W. Mayson et al, *Mayson, French & Ryan On Company Law*, 15th ed. (London: Blackstone Press Ltd., 1998) at 493.

It is also open to question whether employees can institute a derivative action[21] or an action on grounds of unfairly prejudicial or oppressive conduct[22] under the CAMA to compel corporate management to consider their interests in making corporate decisions. Although actions in the former category would appear to be irrelevant to the present issue and therefore offer no succour to employees whose interests are disregarded in the corporate decision making process, there are conceivable grounds on which it may be argued that employees may have recourse to the unfair, prejudicial or oppressive conduct remedy under the CAMA.

Section 311(1) of the CAMA permits an application to be made to the court "for relief on the ground that the affairs of a company are being conducted in an illegal or oppressive manner." Subsection (2) of s. 311 provides that:

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[19] See the CAMA, s. 279(1)&(2).

[20] (1943), 67 E.R 189 (Ch.). See s. 299 of the CAMA for a specific codification of the rule.

[21] See the CAMA, ss. 299 - 309. It is considered that derivative suits are inapplicable to the issue being considered here, that is, whether employees have a course of action against a company or its directors for the non-consideration of their interests in the making of corporate decisions. Consequently, no attempt is made to discuss the purport and ambit of the CAMA provisions on derivative actions.

[22] See the CAMA, ss. 310 - 313.

> An application to the court by petition for an order under this section in relation to a company may be made -
> (a) by a member of the company...
> (b) by any of the persons mentioned under paragraphs (b) (c) and (e) of subsection (1) of section 310 of this Act who alleges-
> (i) that the affairs of the company are being conducted in a manner oppressive or unfairly prejudicial to or discriminatory against or in a manner in disregard of the interests of that person;
> (ii) that an act or omission, or a proposed act or omission was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, or which is in a manner in disregard of the interests of that person.

Section 310 which prescribes the categories of persons who can institute unfair, prejudicial or oppressive- conduct remedy suits provides in subsection (1) that:

> an application to the Court by petition for an order under section 311 of this Act in relation to a company may be made by any of the following persons-
> (a) a member of the company;
> (b) a director or *officer* or former director or officer of the company;
> (c) a creditor;
> (d) the Commission; or
> (e) *any other person who, in the discretion of the court, is the proper person to make an application under section 311 of this Act.* (Emphasis added.)

Employees may therefore institute an oppression remedy suit if they are 'officers' or 'proper persons' within the meaning of s. 310(1) of the CAMA.[23] Officer is defined in s. 650(1) of the CAMA as including a director, manager or secretary. Indeed, it could be argued that corporate employees other than directors, managers or secretaries may qualify as officers for the purposes of the CAMA. Section 650(1) in defining an 'officer' uses the word 'includes' thus signifying that the definition is not exhaustive. It may, therefore, permit an extension to other corporate employees other than directors, managers and secretaries.

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[23] See the CBCA, s. 241(1) which specifically grant corporate officers the standing to file oppression remedy suits. Consequently, employees who qualify as officers have a right under the CBCA to institute such suits.

The meaning of 'proper person' as used in s. 310(1)(e) of the CAMA is not clear as the CAMA does not define that phrase. The question then is: is an employee a 'proper person' within the meaning of s. 310(1) of the CAMA? To the knowledge of the author, there is yet no Nigerian caselaw authority on this point.

The term 'proper person' in a derivative action is not necessarily co-terminous with 'proper person' in oppression remedy suits. Indeed, a proper person within the purview of an oppression remedy suit might not be a proper person in a derivative suit.[24] It would appear that the categories of persons who qualify as proper person for the purposes of a derivative suit are more restrictive and narrower than that in oppression remedy suits.[25] Thus in *Tavares v. Deskin Inc.*[26] a former employee who alleged that he was wrongly dismissed was held to have sufficient standing as a creditor to commence an oppression remedy suit under s. 241 of the CBCA against the principal of his corporate employer who allegedly stripped the corporation of its assets.

Even if it is accepted that an employee is a proper person under s. 310(1)(d) of the CAMA, the likelihood of an employee successfully utilizing the CAMA oppression remedy provisions would appear very remote. Section 279(4) of the CAMA does not impose an obligation or duty on directors to consider the interests of the employees in making corporate management decisions. It merely gives the directors a discretion to do so. Consequently, directors do not owe a duty to the employees to consider their interests in the corporate decision-making process.

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[24] *Lee v. International Consort Industries* (1992), 63 B.C.L.R. (2d) 119 (C.A)

[25] See *Re Daon Development Corporation* (1984), 54 B.C.L.R. 235 (S.C.) at 243 where the court held that the category of 'proper person' in a derivative suit under s. 225(8) of the British Columbia *Company Act* "requires that the category be composed of those persons who have a direct financial interest in how the company is being managed and are in a position - somewhat analogous to minority shareholders - where they have no legal right to influence or change what they see to be abuses of management or conduct contrary to the company's interests." Contra *Lee v. International Consort Industries, ibid,* at 129 where the court held that s. 224(6)(b) of the British Columbia *Company Act* which deals with oppression remedy "was enacted to cover the case of persons in unforeseeable situations who ought to be included" as proper persons.

[26] (1993), 38 A.C.W.S. (3d) 70 (Ont. Gen. Div.)

In *Richardson v. Pitt-Stanley,*[27] a relatively recent decision of the English Court of Appeal, an attempt by an employee to assert a duty of care against the directors of the company in which he worked was denied by the court. In that case, the plaintiff had obtained judgment against his employers, a limited liability company, for breach of s. 14(1) of the *Factories Act 1961* in respect of serious injuries he sustained in an accident at work. Prior to the assessment of damages, the company went into liquidation. Consequently, there were no assets to satisfy the judgment. The plaintiff then commenced an action against the four directors of the company and the company secretary, claiming as damages against them, a sum equal to the sum which he would have recovered against the company had the company been properly insured against employees' injuries in the course of employment. The company had not only failed to insure against liability for injuries sustained by its employees in the course of employment, but the directors and secretary of the company had apparently negligently failed to procure the insurance. Such negligent failure on the part of the directors and secretary amounted to a criminal offence under s.5 of the *Factories Act*. The court, by a majority of 2 to 1, held that although there was a clear failure on the part of the directors and secretary to obtain the insurance, the plaintiff's remedy for such negligence could only be against the company and not against the directors and secretary as individuals. The rationale for this decision, as articulated by Russel L.J, was that "the plaintiff's remedy against the company subsisted at common law and under the 1961 Act. The failure to insure did not deprive the plaintiff of his remedy as such, but rather the enforcement of that remedy by way of recovery of damages."[28]

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[27] [1995] 1 All E.R. 460.

It is very unlikely that the court would grant a remedy against the directors or the company in the absence of an affirmative duty owed to the employees by the directors and/or the company.[29]

Indeed, the utility of s. 279(4) of the CAMA in relation to the employees' interests is hard to see. Commenting on s. 309(1) of the U.K. *Companies Act 1985* which is on all fours with s. 279(4) of the CAMA, a learned English author observes that although this provision "does ostensibly take cognisance of employee interests, the reality is that the relevant section is of little practical use."[30] The impotency of the provisions of the above sections of the CAMA and U.K. *Companies Act* is succinctly stated by another learned

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[28] *Ibid* at 465. It need be pointed out that this case was decided on the basis of the *Employers' Liability (Compulsory Insurance) Act 1969.* Reference was not made to the U.K *Companies Act 1985* or to directors' duties thereunder. Nonetheless, the case is instructive on the question as to whether company directors owe a duty to the employees under English company law. It is indeed indicative of the absence of such duty. Even the *Employers' Liability (Compulsory Insurance) Act 1969* imposes no civil liability on directors for failure to insure employees against injuries in the course of employment. As the Court of Appeal held at 464, "(i)n the instant case there is no express provision in the 1969 statute creating civil liability on the part of the employers. Nor is there any such express provision relating to directors. Indeed it would be anomalous if the directors were to bear civil liability whilst the company of which they were directors was subject to no such liability."

[29] See *Keho Holdings v. Noble* (1987), 38 D. L. R. (4th) 368, 52 Alta. L. R. (2d) 195 (C.A.) where it was held that the exclusion of a complainant from the management of a corporation did not constitute an oppression or unfair prejudice since there was no underlying obligation to admit the complainant to the management.

[30] N. Grier, *U.K. Company Law* (Chichester: John Wiley & Sons Ltd., 1998) at 405.

English author thus:

> Since the directors' duty is to have regard to employees' interests and not necessarily to give effect to them, it would appear that directors fulfil their duty by considering what the employees' interests are and what weight should be given to them, and that a decision by directors reached in good faith cannot be impugned because employees' interests are not promoted or protected by it, provided the members' interests are promoted or protected.[31]

Thus far, it has been seen that the CAMA does not mandate a high degree of social responsibility from companies and their directors nor does it adequately empower even the employees whose interests it permits the directors to consider in making corporate decisions.

b. The Corporate Affairs Commission as a Mechanism for Ensuring Corporate Responsibility in Nigeria

A more promising source for enforcing corporate social responsibility in Nigeria, at least at first glance, is through the Corporate Affairs Commission[32] (hereinafter "the CAC"). The CAC was established under s. 1(1) of the CAMA and is vested with the statutory duties, amongst others, of supervising "the formation, incorporation, registration, management, and winding up of companies" in Nigeria.[33] It also has the duty to "arrange or conduct an investigation into the affairs of any company where the interests of the shareholders and the public so demand."[34]

The CAC's powers of supervising the management and investigating the affairs of a company could, if properly used, act as a check on corporate management excesses or practices which causes or are likely to cause social disequilibrium. As I shall attempt to demonstrate shortly, such supervisory powers could be invoked by the CAC through the use of the oppression remedy provisions of the CAMA to institute oppression remedy suits for the protection of the public interests.

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[31] P. R. Pennington, *Pennington's Company Law*, 7th ed. (London: Butterworths, 1995) at 780 781.

[32] The Corporate Affairs Commission of Nigeria performs similar functions as the Canadian Corporate Registry.

[33] See the CAMA, s. 7(1)(a).

[34] *Ibid* s. 7(1)(c).

As mentioned earlier, s. 311(1) of the CAMA permits applications to the Court by way of petition for relief on the ground that the affairs of a company are being conducted in an illegal or oppressive manner. Under s. 310(1)(d), the CAC is recognised as one of the persons who may make an application under s. 311. Section 311(2)(c) stipulates the grounds upon which the CAC may make such an application. It provides:

> An application to the Court by petition for an order under this section in relation to a company may be made-
> (c) by the Commission in a case where it appears to it in the exercise of its powers under the provisions of this Act or any other enactment that-
> (i) *the affairs of the company are being conducted* in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members or *in a manner which is in disregard of the public interest;* or
> (ii) *any actual or proposed act or omission of the company (including an act or omission on its behalf) which was or would be* oppressive, or unfairly prejudicial to, or unfairly discriminatory against a member or members *in a manner which is in disregard of the public interests.* (Emphasis added.)

The above provision makes clear that the CAC can institute an oppression remedy suit where (1) the affairs of a company are being conducted "in a manner which is in disregard of the public interests" or (2) any actual or proposed act or omission of the company is or "would be ... in a manner which is in disregard of the public interests." The CAC could therefore institute both re-active and pro-active suits under s. 311 of the CAMA.

In sum, the oppression remedy relief under ss. 310 - 313 of the CAMA is meant not only for the protection of the minority members, directors, officers and creditors of the company, but also the general public from unfair, prejudicial or oppressive corporate conduct. The only noticeable difference between the protective shield granted the latter and former category of persons under those sections is that whilst the members, directors, officers and creditors can personally invoke that protective shield by instituting personal oppression remedy actions against the company, the general public cannot, on their own, invoke that protective shield. They must rely on the CAC to institute such suits for and on their behalf to seek protection from the negative externalities of corporate activity.

Although the CAMA does not define the term 'public interests' for the purposes of the oppression remedy relief in s. 311, it would appear safe to submit that persistent and continuous corporate practices which have hazardous consequences on the health, economic well-being or the fundamental rights of the public would amount to a disregard of the public interests within the meaning and intent of ss. 310 - 313 of the CAMA.[35] Consequently, the CAC would be justified in instituting oppression remedy suits for and on behalf of the public against corporations engaged in such corporate practices.

The powers vested in the CAC by ss. 310 - 311 of the CAMA have never, to the best of my knowledge, been invoked against any company in Nigeria despite the clear signs of growing corporate irresponsibility in the country. Few people would doubt that the persistent and continuous flaring of gas by the oil and gas companies in the country's oil and gas producing communities which, as we saw in Chapter 2, has had and continues to have tremendous adverse effects on the health of the residents of the area, is in disregard of the public interests. Indeed, the *Associated Gas Re-injection Act*[36] which prohibits gas flaring in the country is specifically aimed at the protection of the public from the harmful effects of gas flaring. Yet, the CAC has not deemed it fit to utilize its powers under ss. 310 and 311 of the CAMA against the oil and gas companies for the protection of the public interests.

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[35] Public interest has been defined as "something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected." See H. C. Black, *Blacks' Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing Co., 1990, 6th Reprint - 1997) at 1229.

For a number of reasons, it is very unlikely, at least in the foreseeable future, that the CAC will invoke its powers under the CAMA to file oppression remedy suits against multinational oil and gas companies for the protection of the Nigerian public. First, the CAC is completely dependent on the executive arm of the Nigerian government. Indeed, it is part of that arm of government. Although the CAC is a body corporate with perpetual succession, a common seal and a capability of suing and being sued in its own name,[37] its members are exclusively appointed and removed by the government.[38] The CAC's lack of independence from the government is very telling on its efficacy as a defender of the public interests against corporate excesses especially those emanating from corporations with which the government has some economic partnership or alliance.

As mentioned in Chapter 2, the Nigerian government is in joint venture with all major multinational oil and gas companies doing business in Nigeria. The economic interests of the companies, in relation to those joint ventures, are thus inextricably linked with those of the Nigerian government. Consequently, any threat, real or imagined, to the smooth operations of the multinational oil and gas companies is viewed by the government as a threat to its authority and position. An oppression remedy suit by the CAC against the oil companies could potentially affect the corporate operations and economic interests of the companies to the dismay and possibly the embarrassment of the government. For example, if the CAC were to successfully establish before the court that an alleged corporate act(s) is or are in disregard of the public interests, the court has the powers under s. 312(1)(i) of the CAMA to restrain the company and or its directors from "engaging in specific conduct or from doing a specific act or thing."

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[36] Cap. 26, Laws of the Federation of Nigeria, 1990.

[37] See the CAMA, s. 1(2)(a)&(b).

[38] *Ibid* s. 2.

In the context of gas flaring, a court order restraining the oil companies from engaging or continuing gas flaring would most probably hurt the profits of the companies as they would have to spend huge sums of money on the construction of gas transmission plants if they are to continue doing business in the country. This may lead to the possibility of some of them pulling out of Nigeria. This possibility perhaps explains why the government has never seriously implemented the *Associated Gas Re-injection Act* which, as mentioned earlier, prohibits gas flaring.

Besides, the CAC is in no way insulated from the social ills plaguing the public sector of the country. Allegations of inefficiency and corruption have, in the past, been made against the CAC.[39] In the absence of a restructuring and re-organisation of the CAC, it might be too much to expect it to be an effective mechanism for ensuring corporate responsibility in Nigeria.

In view of the defects inherent in the CAMA corporate responsibility provisions and mechanism, Nigerian law-makers might need to amend the CAMA along the lines suggested below in order to resolve the corporate responsibility crisis in the country.

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[39] See C. Okonkwo, "The Corporate Affairs Commission" in E. O. Akanki, ed., *Essays on Company Law* (Lagos: University of Lagos Press, 1992) 14 at 14. Note however that Professor Okonkwo in this article commented on CAC's predecessor, the Companies Registry.

III. Reforming the CAMA to Ensure Corporate Responsibility in Nigeria

The following section recommends three distinct but complementary avenues of reform so as to facilitate and mandate enhanced corporate responsibility in Nigeria to wit: the restructuring of the CAC; amending the CAMA to include consideration of the interests of host communities in the corporate decision making process; and the restructuring of the nature and composition of the boards of large public companies.

A. Restructuring the CAC

As mentioned in part II herein, the CAMA vests the CAC with both supervisory and investigatory powers over companies in Nigeria. Those powers, if properly used, offer a unique opportunity to ensure corporate responsibility in the country. The CAC, as it is presently, appears incapable of fulfilling its statutory mandate due principally to its lack of independence from the executive arm of the Nigerian government.

Consequently, to ensure an efficient CAC, certain things must be done. First, the composition of the membership of the CAC should be restructured in such a way as to guarantee its independence from the executive arm of government. Towards this end, corporate constituencies who are likely to be affected by corporate activity should be represented in the membership of the CAC.[40] Second, the powers of the executive arm of government to appoint and remove the chairman and members of the CAC should be made subject to the approval of the legislature as opposed to the current regime which confers absolute powers on the President and Minister of Trade to appoint and remove the chairman and members of the CAC respectively.[41] Third, the CAC should be managed by adequately trained personnel and provided with the necessary funds to fulfil its statutory mandate.

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[40] The CAC presently has one representative each from the Business community; Labour; the Legal profession; Accounting profession; Manufacturers Association of Nigeria; Nigerian Association of Small Scale Industries; Institute of Chartered Secretaries and Administrators; Securities and Exchange Commission; Federal Ministry of Trade and Tourism; Federal Ministry of Finance and Economic Development; Federal Ministry of Justice; and Federal Ministry of Internal Affairs. See the CAMA, s. 2(b)-(j).

B. Amending the CAMA to Include Consideration of Host Communities' Interests

As we saw earlier, s. 279(4) of the CAMA restricts the matters to be considered by directors in the corporate decision making process to the interests of the "company's employees generally" and those of its members. It is surprising and curious that the CAMA adopts such a position. Local, economic and social circumstances in Nigeria demand that company directors be allowed to consider the interests of other corporate constituencies such as the host communities in deciding what is in the best interests of the company as prescribed in s. 279(3) of the CAMA. It is beyond dispute that business thrives best in a peaceful environment. Given the unrest (both civil and political) prevalent in Nigeria, particularly in the oil and gas producing communities, s. 279(4) CAMA ought to empower company directors to consider the interests of their host communities in making management decisions. This would, in turn, encourage companies to actively participate in and promote activities that ensure a peaceful atmosphere. The companies stand to benefit from such activities.

Further, the CAMA provisions on corporate directors' discretion seem to ignore a fundamental element of the corporation, that is, the social element. As pointed out in Chapter 1, corporations are not only economic institutions, they are social institutions as well. In the latter capacity, corporations play an important part in the societal developmental process. The Nigerian economy is almost entirely based on proceeds from the exploitation of natural mineral resources particularly oil and gas. Companies involved in the exploitation of such mineral resources therefore occupy strategic positions in the life of the country and consequently wield enormous economic powers.[42] In the exploitation of such mineral resources, such companies ought to be socially responsible not just to the country but also to the immediate host communities.

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[41] See CAMA, s. 2.

Corporate law can ensure corporate responsibility, at least in regard to the host community, by empowering directors to have regard to the interests of the host community in making management decisions particularly those that are likely to have negative impact on the community. This is one way of ensuring that these companies, in carrying on their businesses, do not dislocate or disrupt the social and economic life of the communities in which they operate and that they are accountable for their actions.

It is thus suggested that the CAMA should be amended to specifically mention the company's host community as one of the corporate constituencies whose interests the directors are empowered to consider under s. 279(4).[43]

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[42] In Nigeria, the Oil and Gas sector accounts for over forty percent (40%) of the Gross Domestic Product, and more than ninety-five percent (95%) of total exports . See *Nigeria: Selected Issues and Statistical Appendix, I.M.F. Staff Country Report No. 98/78 (Washington DC: International Monetary Fund, August 1998)* at 6 - 11.

[43] More than half the States in the United States of America have expanded the categories of corporate stakeholders whose interests corporate directors are empowered to consider in making corporate decisions. See J. D. Springer, "Corporate Law Corporate Constituency Statutes: Hollow Hopes and False Fears (1999) Ann. Surv. Am. L. 85. For example, the *Indiana Code* provides in s. 23-1-35-1(d)&(f) respectively as follows:

> (d) A director may in considering the best interest of a corporation consider the effects of any action on shareholders, employees, suppliers and other customers of the corporation, and any other factor the directors may consider pertinent."
>
> (f) In making such determination, directors are not required to consider the effects of a proposed

Though enacting the above proposed amendment would be a useful first step, what is also required is an adequate mechanism(s) for ensuring that the directors' discretion in this regard is properly exercised and that non-shareholder corporate constituencies are not adversely affected by corporate activities. This is discussed below.

a. Enlarging Directors' Fiduciary Duties / Granting Personal Right of Action to the Host Communities

A further corporate law mechanism for ensuring corporate responsibility in Nigeria would be to grant those who suffer or are likely to suffer adverse or negative externalities from corporate activities the right to sue the corporation for redress or to prevent the occurrence of such adverse externalities. To achieve this, the CAMA position on corporate responsibility as reflected in s. 279(4) would need to be taken two steps further.

First, the scope of directors' fiduciary duties thereunder should be enlarged to include a duty owed to non-shareholders such as the host communities particularly as regards companies exploiting natural resources. Second, such non-shareholders should be accorded the right to sue the company and /or the directors to ensure compliance with the directors duties or for breach of such duties. According to a Nigerian writer,

> ...the time has come for a policy in Nigeria to ensure that the host communities are recipients of corporate goodwill from the companies operating within them. This should be couched in a provision that will create a contractual right in the affected communities to sue the oil companies for breach.[44]

The need for such corporate law regime in Nigeria becomes the more compelling when viewed from the fact that the prevention of the occurrence of harm to the society from

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corporate action on any particular group or interest as a dominant or controlling factor.

[44] A. Guobadia, "Defining Corporate Social Responsibility for Nigeria's Oil and Gas Sector" (1991) 3 African J. of Int. & Compt. Law 472 at 482.

corporate activities is a better option economically, socially and ethically than the payment of compensation for social dislocations and damage resulting from corporate social irresponsibility.[45] It is also consistent with the human rights duties under the Nigerian *Constitution* as discussed in Chapter 2.

b. Enforcement of the Enlarged Duty

It is suggested that appropriate safeguards, in the form of standing rules, must be put in place in order to protect corporations and their directors from frivolous and ill-founded law suits from non-shareholders.[46] It is proposed, in this regard, that the Nigerian corporate statute should contain the following procedural rules for the enforcement of the proposed rights:

a) a non-shareholder aggrieved by the breach of such enlarged duty who desires to sue the company and or its directors must first apply to the court for leave to institute an action against the company and or its directors,

b) in order for leave to be granted by the court, the non-shareholder/applicant must:

(i) have given a reasonable written notice to the company and or its directors for a specified period of his/her desire to sue and such notice must state the particulars of the alleged violation(s),

(ii) be acting in good faith, and

(iii) show that it is, *prima facie*, in the interest of justice that leave to institute the action be granted.

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[45] See M. Green, "Attainment of Social Goals Requires Corporate Reform" in D. E. Schwartz, ed., *Commentaries on Corporate Structure and Governance, the ALI-ABA Symposiums, 1977 - 1978* (Philadelphia: ALI - ABA,1979) 265.

[46] Such frivolous suits are commonly described as 'strike suits.' See pages 140 - 143 *infra* for a brief discussion of the danger posed by strike suits to corporations.

These procedural rules will help to ensure that companies and directors are not inundated with frivolous lawsuits and consequently that corporate activity is not adversely affected.[47] In specific terms therefore, directors of oil and gas companies in Nigeria ought to be empowered by the CAMA to consider the interests of their host communities in making corporate decisions. The host communities in turn, ought to be accorded the right to sue the companies so as to ensure compliance with the enlarged directors' duties or for breach of same. In effect, the scope of directors' duties under s. 279(4) of the CAMA and the justiciability of same ought to be enlarged to cover non-shareholders such as the companies' host communities.

What follows is an analysis of the above proposed amendment based on an extrapolation of caselaw in the area of application for leave to commence a derivative action. It will be seen that while the proposed amendment is vulnerable to abuse, the judiciary may easily and quickly apply existing principles to quell such 'misfeasance.'

c. Pre-requisite Conditions for Granting Leave to Enforce the Enlarged Duty

As stated above, in order to utilize the proposed right of action against a corporation, and consequently, to invoke the jurisdiction of the court, an intending plaintiff must first seek the leave of the court to institute the action. The essence of this is to ensure that the court is given an opportunity of examining the proposed cause of action with a view to ascertaining its propriety. That way, potentially frivolous suits may be eliminated or at least reduced.

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[47] Such statutory procedural safeguards or rules are not uncommon in corporations law. See, for example, s. 239(2) CBCA; s. 232(2) ABCA; and s. 303(2) CAMA which stipulate similar conditions precedent to the commencement of a derivative suit.

For the court to grant leave, the applicant must satisfy the 'reasonable notice', 'good faith', and 'interest of justice' requirements. The first two requirements are also required in an application for leave to institute a derivative action.[48] The third, that is, the interest of justice requirement, is akin to the 'interest of the corporation' requirement in derivative suits.[49] Consequently, for our purpose in this part of the chapter, reliance shall be placed on derivative suits requirements under the CAMA, CBCA and ABCA and the guidelines enunciated by the courts for assessing applications for leave to sue derivatively under those statutes.

i. Reasonable Notice

An applicant intending to sue a company under the proposed reform must first give a reasonable written notice to the company of his / her intention to sue the company. The essence of the notice requirement is to ensure that the grievance(s) of the intending plaintiff is / are adequately brought to the knowledge of the company. In turn, the company may wish to settle the matter before recourse is had to the judicial system, thus aiding judicial economy of time and resources. It may also help to prevent, or at least reduce, incidence of 'strike suits' against companies. I shall revisit this point soon.

The reasonableness of the notice should be determined both in terms of its content and the time between the service of the notice on the company and the filing of the application for leave. As in derivative suits, the requisite notice should be "straightforward communication" to the company.[50] Although the "notice need not describe the cause of action with perfect clarity, ... it should contain enough information to determine the nature of the complainant's concerns"[51] and the nature of the alleged breach of duty. The notice must also be delivered to the company at its registered office or head office.[52] The notice requirement should not be "construed in an unduly technical or restrictive manner."[53] Consequently, an applicant's failure to "specify each and every cause of action in a notice [should] not ...invalidate the notice as a whole."[54]

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[48] See CAMA s. 303(2)(b)&(c); ABCA s. 232(2)(a)&(b); CBCA s. 239(2)(a)&(b).

[49] See CAMA s. 303(2)(d); ABCA s. 232(2)(c); CBCA s. 239(2)(c).

In relation to the time, the application for leave should not be brought so soon after the notice is delivered to the company.[55] This is to ensure that the company has enough time to attempt to solve the problem complained of or to settle the matter through means other than the judicial system. However, what is reasonable time would depend on the circumstances of each case. To make for certainty in the determination of the reasonableness of time, it is suggested that a specific time frame should be mandatorily required by the proposed reforms. In other words, the CAMA should specify the time that should elapse between the giving of the notice and the filing of the application for leave to sue.[56] Failure to give the requisite notice, as in derivative actions, should be fatal to the application for leave to sue the company.[57]

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[50] D. H. Peterson, *Shareholder Remedies in Canada* (Toronto: Butterworths, 1998) at para. 17.37.

[51] *Ibid.*

[52] The CAMA already contain what would seem an adequate provision on service of documents on companies. Section 78 of the CAMA provides that "a court process shall be served on a company in the manner provided by the Rules of Court and any other document may be served on a company by leaving it at, or sending it by post to, the registered office or head office of the company." It is submitted that a written notice of an applicant's intention to sue a company under the proposed reform would qualify as "any other document" as used in s. 78 of the CAMA.

[53] Cory, J. in *Armstrong v. Gardner* (1978), 20 O.R. (2d) 648 (Ont. H.C.).

[54] Nemetz, C.J.B.C. in *Bellman v. Western Approaches Ltd.* (1981), 33 B.C.L.R. 45 at 53 (C.A.).

[55] See *Tremblett v. S.C.B. Fisheries Ltd.* (1994), 363 A.P.R. (116 Nfld & P.E.I.R.) 139 (Nfld. S. C.) where, in an application for leave to institute a derivative action, the court held at 148 that "the reasonableness of notice as a separate criterion relates to the provision of sufficient time for the board itself to reach a conclusion as to whether action should be commenced, as opposed to the merits of that decision itself."

ii. Good Faith

There is no universally accepted definition of good faith for the purpose of seeking leave to file a derivative suit. However, Puddester, J. gives what is perhaps a concise definition of that term in *Tremblett v. S.C.B. Fisheries.*[58] To him:

> the concept of good faith encompassed by the statutory requirements...relates to the intention of the applicant - whether the application is brought with the motive and intention of benefiting the corporation, or for some recognised or subliminal purpose or benefit outside that interest...[I]t is necessary that an applicant bring cogent evidence establishing clearly on a preponderance of evidence that the application is in fact brought in good faith."[59]

Good faith encompasses, among other things, an honest belief, the absence of malice or design to defraud or to seek an unconscionable advantage.[60] In common usage, the "term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation."[61]

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[56] See, for example, s. 245(2) of the Ontario *Business Corporations Act* under which the complainant is required to give "fourteen days' notice to the directors of the corporation" of his/her intention to apply to the court for leave to sue derivatively as a condition for the grant of leave.

[57] *Covia Canada Partnership Corp v. P.W. Corp.* (1993), 105 D.L.R. (4th) 60 (Ont. Gen. Div.).

[58] *Supra* note 55.

[59] *Supra* note 55 at 151.

[60] H. C. Black, *Black's Law Dictionary, supra* note 35 at 693.

The obligation to act in good faith should be a positive requirement on an applicant seeking leave to sue a company for breach of the proposed duty.[62] Consequently, "it is not one which arises only where there may be evidence to the contrary adduced."[63] Even in cases where the intended defendant company does not offer any evidence in rebuttal, the intending plaintiff must satisfy the court, on the basis of evidence, that he / she is acting in good faith.

The good faith requirement is meant to ensure that "private vendetta" is prevented.[64] The court should ensure that the proposed suit is not frivolous or vexatious.[65] Lack of good faith would be more readily inferred from absence of a belief in an arguable cause of action.[66] As in derivative suits, where the applicant is seeking leave out of ulterior motives, malice or revenge without necessarily believing in the course of action, leave should be denied for lack of good faith. In *Betons Bomix Ltd. v. Kenny*,[67] for example, leave was denied to the applicant who sought leave to commence a derivative action merely as a means of responding to a statement of defence in an existing action brought by the applicants for damages sustained as former shareholders of the company.

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[61] *Ibid.* See also Puddester, J. in *Tremblett v. S.C.B. Fisheries, supra* note 55 at 151where he held thus:

> ... the intention of an individual is a matter in the mind of that individual. Since no other witness nor the court can see into and assess the applicant's mind itself, the only direct evidence in that regard can come from the individual's own statement as to that intention. However, equally necessarily, the only objective evidence which can be brought before the court must come from the surrounding circumstances, including the actions and outward conduct of the individual.

[62] See *Young v. Best* (2000), 101 A.C.W.S (3d) 502 (Nfld. S. C.) which relied on *Tremblett v. S.C.B. Fisheries, supra* note 55 at 151.

[63] *Tremblett v. S.C.B. Fisheries, supra* note 55 at 151.

[64] See R. V. W. Dickerson et al, *Proposals for a New Business Corporations Law for Canada* (hereinafter 'Dickerson Report'), Vol. 1 (Ottawa: Information Canada, 1971) at 161 and para. 482.

[65] See *Re Bellman and Western Approaches Ltd.* (1981), 130 D.L.R. (3d) 193 (B.C.C.A.); *Re Marc-Jay Investments Inc. and Levy* (1974), 50 D.L.R. (3d) 45 (Ont. H. C.)

[66] See *Acapulco Holdings Ltd.et al v. Jengen et al* (1997), 193 A.R 287 at 291; *Richardson Greenshields of Canada Ltd. v. Kalmacoff et al* (1995), 123 D.L.R. (4th) 628 (C.A.)

Inordinate delay in bringing an application may be evidence of lack of good faith.[68] Where, however, the delay is satisfactorily explained to the court, leave should be granted. In *O'Fearghail Holdings Ltd. v Bignold*,[69] the Alberta Court of Queen's Bench held that:

> the delay of four years is unfortunate but does not indicate bad faith. The questions which the applicants seek to have determined in this action were raised within a year of Northern ceasing operations. This distinguishes this case from *Dershko v. Domaradzki* where a delay of three years before commencement of any claim caused Roherty J. concern as to whether the action had been brought in good faith. Furthermore, the delay here has been largely explained. Much of the time since commencement of the action has been taken up waiting for the accountant's report....There is some indication that the parties contemplated some form of alternative dispute resolution during the delay period but that possibility was abandoned.[70]

In the context of an application under the proposed reform, a delay in seeking leave to sue occasioned by the fact that the applicant was awaiting the report of a commission of inquiry (in the case of corporate activities resulting in environmental degradation, destruction of property or breach of fundamental rights) or scientific report or settlement negotiations should not be counted against the applicant. Awaiting the outcome of those events would amount to a satisfactory explanation of the delay.[71]

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[67] (1995), 381 A.P.R. (149 N.B.R. (2d)) 373 (Q.B.).

[68] See *LeDrew v. LeDrew Lumber Co.* (1989), 223 A.P.R. (72 NFLD. & P.E.I.R.) 71 (Nfld. S.C.) where leave was denied partly because the applicant waited for ten years to bring the application for leave.

[69] [2001] A.J. No. 793 [unreported]

[70] *Ibid.*

iii. Interest of Justice

The third requirement for leave under the proposed reform is that the applicant must show that it is, *prima facie*, in the interest of justice that leave to institute the action be granted.[72] An applicant who establishes that he / she has an arguable case fit for judicial determination would satisfy this requirement.[73] Whilst the CAMA, ABCA and CBCA derivative provisions require leave to be granted if it "appears"[74] to be in the interest of the corporation that the action be brought, what would be required under the reform being advocated here is a '*prima facie*' case that it is in the interest of justice that leave be granted.[75]

Prima facie, for our purpose here, means "on the face of it" or "so far as can be judged from the first disclosure."[76] The applicant should therefore depose to facts, in the affidavit in support of the application, which if proven to be true, would likely amount to a breach of the proposed duty on the part of the company and its directors to consider the applicant's interest(s). There must therefore be sufficient evidence, which on the face of it, discloses the possibility[77] that the duty to the host communities or members thereof has been breached by the company intended to be sued.

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[71] See *O'Fearghail Holdings Ltd. v. Bignold, supra* note 69.

[72] In the context of applications to commence a derivative suit, Nigerian and Canadian corporate law statutes require that the action be in the interest of the corporation. However, the CAMA, the ABCA and CBCA would appear to differ as regards the particulars of this requirement. Whilst the CAMA, s. 303(2)(d) requires the court to be satisfied that "it appears to be in the *best* interest of the company that the action be brought," both the ABCA and the CBCA would permit the grant of leave if "it appears to be in the interests of the corporation." See ABCA, s. 232(2)(c); CBCA, s. 239(2)(c).

[73] See *Bellman v. Western Approaches* (1982), 33 B.C.L.R. 45 (B.C.S.C.) at 53 - 54.

[74] See, CAMA, s. 303(2)(d); ABCA, s. 232(2)(c); and CBCA, s. 239(2)(c).

[75] Indeed, the British Columbia *Company Act* requires in s. 225(3)(c) that an applicant for leave to sue derivately show a 'prima facie' case that it is in the interest of the corporation. Contra, CAMA, ABCA, and CBCA, *ibid* which permits leave if it "appears" to be in the best interest (CAMA) or interest (ABCA and CBCA) of the company.

[76] H.C. Black, *Black's Law Dictionary, supra* note 35 at 1189. See also, *Re Northwest Forest Products Ltd.*, [1975] 4 W.W.R. 724 (B.C.S.C.); B. Welling, *Corporate Law in Canada: The Governing Principles*, 2nd ed. (Toronto: Butterworths, 1991) at 529.

In this regard, it might be worthwhile to require the applicant to file, along with the application for leave, a proposed Statement of Claim. That way, the judge is better able to ascertain the reasonableness of the cause of action and, consequently, whether justice would be served by granting leave to the applicant.

Interest of justice is not, in this context, synonymous with the economic or financial interest of either the applicant, the intended defendant company or some other party(ies) who might be involved in the suit if leave is eventually granted. Rather, it is synonymous with asking the question whether justice will be served if leave is granted or conversely, whether justice could be said to have been denied if leave is refused. In effect, interest of justice here equates with whether, on the basis of the facts shown in the application, the applicant ought to be given an opportunity to seek justice. This point is very important because Nigerian judges are wont to view suits against oil and gas companies in Nigeria as potentially tied to and detrimental to the economic health of the country.[78] Such a view might lead to the denial of leave to deserving applicants who wishes to sue oil and gas companies.

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[77] Paraphrasing Macdonald, J. in *Walter E. Heller Financial Corp. v. Powell River Town Centre Ltd.* (1983), 49 B.C.L.R. 145 (B.C.S.C.) at 153.

[78] In *Irou v. Shell-BP* [unreported] Suit No. W/89/71 (Warri High Court) for example, the judge refused to grant an injunction against Shell even though the company had polluted the plaintiff's land, fish pond and creek. The judge explained the rationale for his decision thus: "To grant the order ... would amount to asking the defendant [Shell-BP] to stop operating in the area....The interest of third persons must be in some cases considered, for example, where the injunction would cause stoppage of trade or throwing out of a large

d. Exercise of the Court's Discretion to Grant or Refuse Leave

The court has a discretion to grant or refuse leave. Whether or not leave is granted to an applicant will depend largely on the satisfaction of the requirements above. However, the court should refrain from determining the merits of the proposed action at the hearing of the application for leave. The Canadian courts have developed some guidelines for the exercise of the discretion vested in the courts in applications for leave to sue derivatively. Those guidelines are, within the context of the proposed reform to the CAMA, considered apposite.

O'Leary J. in *Re Marc-Jay Investments Inc. and Levy*[79] provides an insight into how the discretion of the court should be exercised thus:

> It is obvious that a judge hearing an application for leave to commence an action, cannot try the action. I believe it is my function to deny the application if it appears that the intended action is frivolous or vexatious or is bound to be unsuccessful. Where the applicant is acting in good faith and otherwise has the status to commence the action, and where the intended action does not appear frivolous or vexatious and could reasonably succeed; and where such action is in the interest of the shareholders,[80] then leave to bring the action should be given.[81]

The fact that the intended defendant contradicts the evidence put forth by the

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number of work people." The judge held that nothing should be done to disturb the operations of the oil industry which "is the main source of this country's revenue." See also, *Chinda v. Shell-BP* (1974), 2 R.S.L.R. 1 at 14 where the court, in refusing to grant an injunction against Shell-BP, held: "The statement of claim demands an order that defendants refrain from operating a similar flare stack within five miles of plaintiffs' village, an absurdly and needlessly wide demand."

[79] (1974), 5 O.R. (2d) 235 (Ont.H.C.)

[80] For our purpose here, substitute the phrase 'where such action is in the interest of justice' for the phrase "where such action is in the interest of the shareholders" as used by O'Leary J. herein.

[81] *Supra* note 79 at 236 - 237.

applicant in support of the application should not, in and of itself, lead the court to conclude that leave should be refused. Indeed, the mere fact of such contradictory evidence may be sufficient indication that there is a triable issue(s) which would warrant a judicial determination. Macdonald J. commented upon such a scenario in *Walter E. Heller Financial Corp. v. Powell River Town Centre Ltd.*[82] To him,

> (t)he ultimate rights of the parties will be resolved on the basis of which version of those facts is found to be correct. The authorities are clear that it is not appropriate to resolve such issues at this stage of the proceedings on the basis of conflicting affidavits which have not even been tested by cross-examination. Such conflict should be resolved at trial....the fact is that the opposing parties do put their differing views before the court and they become a factor in the exercise of the court's discretion. However, where the opposing views are at opposite poles and an issue of credibility clearly arises, ...the sole purpose in considering the respondents' version of the facts is to test the reasonableness on its face of the petitioners' version.[83]

The court's discretion is no doubt a wide one.[84] It is, however, to be exercised sparingly.[85] As pointed out in *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.*[86] the court should not attempt to try the case when deciding whether the requirements for leave have been satisfied. Indeed, "it is not necessary for the applicant to show that the action will be more likely to succeed than not."[87]

e. Will the Enlarged Duty Encourage Strike Suits?

The proposed reform of the CAMA may have a potential setback. The reform may unwittingly serve as a stimulus for the oil producing communities to file 'strike suits' against oil and gas companies for the purpose of coercing them into costly settlements. This may have the unintended effect of crippling the Nigerian oil and gas industry. In turn, the Nigerian economy which, as mentioned in Chapter 2, is largely dependent on revenues from the oil and gas sector might be adversely affected.

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[82] *Supra* note 77 at 150 - 151, and 153.

[83] *Ibid.*

[84] See *Bellman v. Western Approaches Ltd.*(1981), 33 B.C.L.R.45 at 56 (B.C.C.A.).

[85] See *Feld v. Glick* (1975), 8 O.R. 7 (Ont. H.C.)

[86] (1995), 13 B.C.L.R. (3d) 300 (B.C.S.C.)

[87] *Ibid* at 315 - 316.

Strike suits are "unique creatures with enormous potential for good and evil."[88] The danger posed by strike suits is particularly apparent in securities litigation in the United States. That danger is captured by Sharpe and Reid thus:

> Even defendants who have done nothing wrong face Hobson's choice: to pay for a very expensive battle in the courts and eventually risk a potentially exorbitant jury damage award, or settle. Most defendants eventually swallow their indignation and make the prudent economic choice and, as a result, settlement has become the typical outcome of class action securities litigation in the United States.[89]

Strike suits have been described as "the commencement and pursuit of a class proceeding where the merits of the claim are not apparent but the nature of the claim and targeted transaction is such that a sizeable settlement can be achieved with some degree of probability."[90] As held in *Intercontinental Precious Metal Inc. v. Cooke*[91] a strike suit is "an action designed to blackmail management into a costly settlement at the expense of the corporation."[92] Such suits are usually instituted against the company and / or the directors primarily for their settlement value by lawyers on behalf of the shareholders following a sudden decline in the company's stock.[93]

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[88] Fay, J. in *Johnson v. General Motors Corp.*, 598 F.2d 432, 439 (5th Cir. 1979).

[89] S. Sharpe & J. Reid, "Aspects of Class Action Securities Litigation in the United States" (1997) 28 Can. Bus. L. J. 348 at 353-4.

[90] Cumming, J. in *Epstein v. First Marathon Inc.* (2000), 2 B.L.R. (3d) 30 at 41 (Ont. Superior Court).

[91] (1993), 10 B.L.R. (2) 203 (B.C.S.C.). See also, *Discovery Enterprises Inc. v. Ebco Industries Ltd.* (1998), 40 B.C.L.R. 43 (B.C.S.C.).

[92] *Ibid* at 213.

In the Nigerian context however, there are mitigating factors against the emergence of strike suits as a phenomenon in the litigation process. Consequently, the proposed reform may not result in United States-style strike suits. First, oil and gas producing communities in Nigeria are permitted under current Nigerian law to file tort class actions, in the form of representative action, against oil and gas companies for injury resulting from the corporate activities of those companies.[94] Yet, the fact that representative actions are permitted under Nigerian law has not led to a barrage of suits against oil and gas companies.

Second, Nigerian judges are very conservative in the award of damages especially in litigation relating to oil and gas operations.[95] Although, in the recent past, a considerably high amount of damages were awarded against some oil companies for injury resulting from oil operations,[96] the cases are so few that it could be said that a consistent pattern indicating such high monetary awards as a growing feature in compensation awards in Nigeria is yet to emerge. Nigerian judges are sometimes reluctant to grant injunction against oil companies even when it is clear that the corporate activity sought to be stopped by such injunction adversely affect the interest of others.[97]

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[93] M. B. Dunn, "Pleading Scienter After the Private Securities Litigation Reform Act: Or, a Textualist Revenge (1998) 84 Cornell L. Rev. 193 at 195.

[94] See J. G. Frynas, *Oil in Nigeria: Conflict Litigation Between Oil Companies and Village Communities* (Hamburg: LIT VERLAG Munster, 2000) at 208. Indeed, most suits against oil and gas companies for damage resulting from their corporate activities are instituted by the affected oil producing communities through their representatives. See, for example, *Shell v. Tiebo* VII (1996), 4 N.W.L.R. 657. That case was instituted by the plaintiffs on behalf of the Peremabiri community for damage resulting from oil spill and for the pollution of the community stream. The court awarded 6 million Naira against Shell in favour of the community. See also, *Shell v. Farah* (1995), 3 N.W.L.R. (Part 382) 148; *Shell v. Otoko* (1990), 6 N.W.L.R. (Part 159) 693; *Shell v. Enoch* (1992), 8 N.W.L.R. (Part 259) 335.

[95] See J. G. Frynas, *ibid* at 215 for a table indicating the amount of compensation awarded in selected oil-related litigation in Nigeria.

[96] See *Shell v. Isaiah* (1997), 6 N.W.L.R. (Part 508) 236 where the court awarded the plaintiffs the sum of 22 million Naira against Shell. See also, *Chief Tigbara Edamkue & Others v. Shell Petroleum Development Co. (Nig) Ltd.*, Suit Nos. FHC/PH/84 & 85/94 [unreported], judgment delivered on Monday, June 28, 1999. In that case, two cases against Shell resulting from the same incident were consolidated into one. Aina, J. of the Federal High Court, Benin-City, awarded the sum of 156,602,915 million Naira against Shell in favour

In order to limit the possibility of strike suits becoming an unintended feature in the proposed reform, it might be necessary to give specific powers to judges to award punitive costs against plaintiffs who institute frivolous and vexatious suits under the reform. Whilst the general impecuniousness of most Nigerians might make the enforcement of such costs awards difficult, and perhaps impossible in some cases, the mere fact that such awards can be made by the court against the plaintiff should act to dissuade frivolous suits. It is also thought that the various requirements for granting leave to sue may, if properly implemented by the court, weed out frivolous suits.[98]

The corporate governance model proposed above will help to ensure that incidents of corporate complicity in environmental pollution and human rights abuse in Nigeria are reduced. The threat of litigation by the host communities for breach of such enlarged duties

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of the plaintiffs in the first case, and the sum of 88,753,686 million Naira against Shell in favour of the plaintiffs in the second case.

[97] See *Irou v. Shell-BP, supra* note 78; *Chinda v. Shell-BP, supra* note 78.

[98] See the Dickerson Report, *supra* note 64. It should be noted that the requirements for instituting class action (strike suits) in relations to securities litigations in the United States differ from the requirements being proposed here. The requirements imposed by the United States *Private Securities Litigations Reform Act* of 1995 relates to (1) the qualification, rights and duties of the plaintiff; (2) the qualifications and obligations of the plaintiff's counsel; (3) pleading requirements otherwise called the scienter; and (4) liability of the defendant. For a detailed examination of these requirements see: M. G. Dailey, "Preemption of State Court Class Action Claims for Securities Fraud: Should Federal Law Trump? (1999) 67 U. Cincinnati L. Rev. 587; P. J. Meyer, "What Congress Said About the Heightened Pleading Standard: A Proposed Solution to the Securities Fraud Pleading Confusion" (1998) 66 Fordham L. Rev. 2517.

as proposed above will, in no small measure, help keep the oil companies in check. The proposed model becomes the more compelling in Nigeria when viewed against the fact that (1) the government, which ought ordinarily to protect and preserve the rights of all Nigerians including the inhabitants of the oil producing communities by ensuring compliance with the law, is itself in partnership with the oil companies in the violation of those rights and, (2) public institutions such as the CAC are, for a variety of reasons,[99] inefficient and thus incapable of protecting the public interests from the negative externalities of corporate activities.

Therefore, in order to ensure the protection of the non-shareholder-individuals who bear the brunt of the negative externalities of the corporate activities of the oil and gas companies in Nigeria, the CAMA ought to empower those individuals to sue the companies under clearly defined rules as hereinbefore articulated. Besides, such extended rights would amount to a clear strut of public policy by the government in line with the Directive Principles of State Policy as provided in Chapter II of the *Constitution of the Federal Republic of Nigeria 1999* and the erstwhile Constitutions of the country.[100]

f. Potential Impediments to the Implementation of the Enlarged Duty

Some potential impediments which may affect the efficacy of the corporate social responsibility model proposed above. These impediments are however not peculiar to corporations law as they affect the general administration of justice in Nigeria.

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[99] Such reasons include the lack of finance, inadequate personnel, corruption, and unnecessary bureaucracy. See C. Okonkwo, *supra* note 39.

[100] See pages 151 - 153 *infra* for a discussion of some of the provisions of Chapter II of the *1999 Constitution.*

i. Poverty and Illiteracy

Poverty and illiteracy will, perhaps, be the greatest impediment to the effectiveness of the proposed reform for ensuring corporate responsibility if adopted in Nigeria. These two factors go hand-in-hand. Poverty breeds illiteracy and *vice versa*. Rural communities in Nigeria are mainly inhabited by poor and illiterate people. In similar vein, a large proportion of urban dwellers are also poor and illiterate. These people are either completely ignorant of their rights, or where they are aware of such rights, are too poor to afford the expenses involved in enforcing them in the case of breach. In such circumstances the rights of the host communities, even if guaranteed in the CAMA, would almost be meaningless. Poverty along with the high cost of litigation in Nigeria restricts the access of the poor to the law courts and consequently justice. Access to court is a mandatory pre-requisite to the actualization and enjoyment of whatever rights that may be guaranteed in any statute.

Non-governmental organisations (hereinafter "NGOs") with the requisite financial resources may help to ensure that public interests are not unnecessarily adversely affected by corporate activities. However, the effectiveness of the NGOs as mechanism for the protection of public interests/ rights in Nigeria is hamstrung by the issue of *locus standi*.

Locus standi simply means the legal capacity to institute proceedings in a court of law.[101] As distilled from Nigerian caselaw, that term has two primary elements. To be entitled to the standing to institute an action, a plaintiff or litigant must establish that he/she/it, (1) is directly affected by the act complained of, or (2) has a peculiar or personal rights which has been infringed or which faces a real likelihood or threat of being infringed. Consequently, a general interest common to the public at large cannot accord a right to sue.[102]

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[101] P.A.O. Oluyede, *Constitutional Law in Nigeria* (Ibadan: Evans Brothers Ltd., 1992) at 369.

The attitude of the Nigerian judiciary to the issue of *locus standi* particularly in relation to public interests/rights litigation is, regrettably, less than satisfactory. Nigerian judges are wont to strike out a suit once the plaintiff is unable to show direct personal interest in the matter forming the substratum of the suit.[103] In *Olawoyin v. Attorney General of Northen Region*[104] for example, the Supreme Court of Nigeria, per Unsworth F.J., held, while dismissing an appeal, that "to hold that there was an interest here would amount to saying that a private individual obtains an interest by mere enactment of a law with which he may in the future come in conflict; and I would not support such a proposition."[105] Other cases, notably *Adesanya v. President of Nigeria,*[106] confirms how strictly the Nigerian courts adhere to the *locus standi* doctrine.

It is submitted that in view of Nigerian circumstances, experiences and needs, the Nigerian judiciary must make a bold and desirable move from the present strict adherence to the *locus standi* doctrine to that of judicial activism when human rights and the environment are at serious risk. All too often, Nigerian judges rely on caselaw authorities from foreign jurisdictions in denying plaintiffs *locus standi* ignoring, in the process, the fact that those decisions were arrived at in societies whose social and political life and experiences are completely different from those of Nigeria. Indeed, there is some danger in strictly adhering to the *locus standi* doctrine. That danger was acknowledged by Attanda Fatayi-Williams, Chief Justice of Nigeria, (as he then was) in *Adesanya v. President of Nigeria.*[107] To him,

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[102] *Ibid* at 370.

[103] There are good reasons for adopting such position. It shuts out the officious intermeddler or professional litigant, thus ensuring judicial economy of time and resources.

[104] (1961), 1 ALL N.L.R. 269.

[105] *Ibid* at 272.

[106] (1981), 2 N.C.L.R. 358.

> to deny any member of such a society who is aware or believes, or is led to believe, that there has been an infraction of any provisions of our Constitution, or that any law passed by any of our Legislative Houses, whether Federal or State, is unconstitutional, access to a court of law to air his grievance on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organised disenchantment with the judicial process.... In the Nigerian context, it is better to allow a party to go to court and be heard than to refuse him access to our courts. Non-access, to my mind, will stimulate the free-for-all in the media as to which law is constitutional and which law is not.[108]

In order to ensure that poverty and illiteracy do not render the proposed rights meaningless, it is suggested that non-governmental organisations be granted standing to sue for and on behalf of the public. Such standing could be based along the line of public interests standing as developed, over time, by the Supreme Court of Canada.[109] In *Finlay v. Minister of Finance of Canada*[110] the Supreme Court of Canada enumerated the criteria for the exercise of judicial discretion to recognize public interest standing. These are that (1) the issue involved in the suit is appropriate for judicial determination, (2) the issue is a serious issue in which the individual has a genuine interest, and (3) there is no reasonable and effective manner to bring the issue before the court.

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[107] *Ibid.* Note however that the Supreme Court of Nigeria in *Adediran v. Interland Transport* (1991), 9 N.W.L.R. (Part 214) 155 declared void the common law restriction on the right of a private individual to litigate a public nuisance as being inconsistent with s. 6 (6) (b) of the *1979 Constitution*. Common law requires a private person who intends to litigate a public nuisance to obtain the consent of the Attorney General in that regard, failing which he / she will be denied *locus standi*.

[108] *Ibid* at 359.

[109] See *Finlay v. Minister of Finance of Canada,* [1987] 1 W. W. R. 603 (S.C.C.). See also, *Minister of Justice of Canada v. Borowski,* [1981] 2 S. C. R. 575 (S.C.C.); *N. S. Bd. of Censors v. McNeil,* [1976] 2 S. C. R. 265 (S.C.C.); *Thorson v. A. G. Canada,* [1975] 1 S. C. R. 138 (S.C.C.).

[110] *Ibid.*

ii. Inadequate Judicial Infrastructure

Even where there is access to the courts, the courts are manifestly rife with law suits and are ill-funded by the government. The chaotic state of the Nigerian judiciary is graphically captured by Human Rights Watch thus:

> Court facilities are hopelessly overcrowded, badly equipped, and underfunded. Interpreters may be nonexistent or badly trained. Court libraries are inadequate. There are no computers, photocopiers, or other modern equipment; and judges may even have to supply their own paper and pens to record their judgments in longhand. If litigants need a transcript of a judgment for the purposes of an appeal, they have to pay for the transcripts themselves.[111]

It is not unusual for a high court in Nigeria to have on its cause-list as many as twenty cases slated for hearing daily. In commercial cities such as Lagos, the number could be considerably higher. The judges, overworked and poorly remunerated, are prone to adjourn as many cases as possible leading to long delays in the litigation process. Besides, in the rare instances where cases are heard in court, the process is painfully slow as the judges, as a result of lack of court recorders and recording machines, are forced to manually take written notes of proceedings in court.[112]

These realities should not however doom discussion about corporate law reform. Put another way, it is worthwhile to strive to improve Nigerian law while acknowledging serious potential obstacles to the meaningful implementation of such improvement. As the Nigerian society and economy grow, albeit incrementally, these suggested reforms become the more feasible. Furthermore, there are complementary methods to enhance how corporations operate in Nigeria as discussed below and throughout Chapter 4.

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[111] Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York: Human Rights Watch, 1999) at 156.

[112] For a detailed examination of the causes of delays in Nigerian courts, see T. Osipitan, "The Problems and Causes of Delays in Criminal Justice Administration" in C. O. Okonkwo, ed., *Contemporary Issues in Nigerian Law* (Lagos: Taiwo Fakayede, 1992) 490. Although that article focusses on causes of delays in criminal justice administration, some factors identified therein account, with equal force, for delays in civil causes and matters.

C. Restructuring the Nature and Composition of Corporate Boards in Nigeria

In addition to the enlargement of the duties of company directors to include a duty owed to the host communities, the CAMA might need to be amended in such a way as to restructure the nature and composition of the boards of large public companies. The CAMA does not contain specific provisions on the composition of corporate boards in Nigeria. It merely stipulate in s. 246(1) that a company "shall have at least two directors." While the said position of the CAMA on the composition of corporate boards seem satisfactory in respect of closely-held or small corporations, the same cannot be said in respect of large corporations such as the multinational oil and gas companies whose daily corporate activities have enormous social consequences on the lives of Nigerians.

As pointed out in Chapter 1, there are strong arguments made by non-shareholder interests advocates that non-shareholders whose interests are substantially affected by corporate operations should be allowed a say in the governance of such companies.[113] The argument is that such non-shareholders should be allowed to have representative sit on such boards so as to ensure their protection from the negative externalities of corporate activity.

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[113] See J. W. Singer,"Jobs and Justice: Rethinking the Stakeholder Debate" (1993) 43 U.T.L.R. 475; H. Hansmann, "Worker Participation and Corporate Governance" (1993) 43 U.T.L.R. 589; K. Van Wezel Stone, "Employees as Stakeholders under State Nonshareholder Constituency Statutes" (1991-92) Stetson L. Rev. 45. See also, R. Nader et al, *Taming the Giant Corporation* (New York: W.W. Norton, 1976) at 123; R. Howse & M. J. Trebilcock, "Protecting the Employment Bargain" (1993) 43 UTLR 751 at 778.

Of particular relevance to the theme of this thesis is Professor Stone's idea that general public directors be appointed to serve on the boards of very large corporations.[114]

It seems Professor Stone's suggestion would be suitable to the economy of a developing country like Nigeria. A representative of an efficient CAC might be an appropriate 'general public director' in the boards of large public corporations in Nigeria. Such public director, whose sole responsibility is the protection of the public interests from corporate excesses, must however be statutorily compelled to render annual account of his or her stewardship to the public. The utilization of a single 'general public director' would be cost-effective. Indeed, such public director's remuneration should not be paid by the corporation in which he serves but by the general public through the government.

Two immediate advantages would accrue from the public director's remuneration being paid by the general public. First, the director's loyalty and dedication to ensuring the protection of non-shareholder constituencies will be better guaranteed.[115] Second, that arrangement will ensure that corporate activity is not unnecessarily bogged down by some extra agency cost which would be the case if the public director was to be remunerated by the company on whose board he or she sits.

It seems clear that incidents of environmental and human rights abuse by oil and gas companies in the oil and gas producing communities of Nigeria would be greatly reduced if those communities were empowered by the CAMA to have their representative(s) on the boards of those companies.

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[114] C. Stone, *Where the Law Ends; the Social Control of Corporate Behavior* (New York: Harper & Row, 1975) at 46.

[115] The author realises that the impact of such lone 'general public director' might be undermined by other directors who may easily outvote the public director at board meetings. However, considering that the public director will be duty-bound to render account of his or her service to the public, the fear of the company being exposed by the public director when rendering such account as being insensitive to the public interests may reduce the likelihood or possibility of such lone public director being undermined by corporate boards.

IV. The Nigerian Constitution and Corporate Social Responsibility

Beyond the mere desirability of the reforms suggested herein, the author also argues that they are constitutional necessities given obligations under the *Constitution of the Federal Republic of Nigeria 1999* (hereinafter "the *1999 Constitution*"). As mentioned earlier, the 1999 *Constitution* contains provisions that actively enjoin the state to foster corporate social responsibility. The Fundamental Objectives and Directive Principles of State Policy in Chapter II of that *Constitution* stipulate part of the Economic objectives of the Nigerian State as follows :

> The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution -
> (b) control the national economy in such a manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity.[116]

Section 17 of the *Constitution*, while stating that the country's social order is founded on the ideals of freedom, equality and justice, goes further to provide that the

> (e)xploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented.[117]

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[116] See the *Constitution of the Federal Republic of Nigeria, 1999* (hereinafter the 1999 *Constitution)* s. 16(b).

[117] *Ibid* s. 17(1)&(2)(d). It is to be noted that the 1999 *Constitution* does not define the phrase "good of the community" as used in s. 17. However, it seems safe to say that where the exploration and exploitation of mineral resources leave, in its wake, environmental degradation, such would amount to a violation of the letter and spirit of that section of the *Constitution* as environmental degradation is certainly against the 'good of the community'. The reality in the mineral producing communities of Nigeria, especially oil and gas producing communities, is that the exploitation of those minerals often lead to hazardous environmental degradation and pollution which, in turn, adversely affect the health and the livelihood of the inhabitants of those communities. Although s. 17 of the *Constitution* states that such consequences shall be prevented, it does not stipulate or prescribe how the prevention is to occur. This defect could have been cured if Chapter II of the *Constitution*, of which s. 17 forms a part, was justiciable. A mandatory corporate social responsibility

Whilst the exploitation of oil and gas has no doubt contributed immensely to the overall development of the country, it cannot entirely be said to have been for "the good of the community" in view of the environmental degradation and human rights abuses associated with it. Gas Flaring and oil spills have consistently hampered human and economic life in the oil and gas producing communities. Consequently, to the ordinary residents of those communities, oil exploitation in Nigeria has been for reasons other than the good of their communities contrary to the letter and spirit of the s.17 of the 1999 *Constitution.*

Although it is the State which primarily bears the task of identifying with and seeking the achievement of the social and economic goals set out in Chapter II of the *Constitution*, it is incumbent on Nigerians to aid the government in the realisation of those goals. This they can do by ensuring that their daily activities are in line with the declared goals of the country. Individuals have this duty due to s. 24(d) of that *Constitution* which provides :

> It shall be the duty of every citizen to make positive and useful contribution to the advancement, progress and well-being of the community where he resides.

Whether corporations have the same constitutional duty is an open question. It seems debatable whether corporations qualify as citizens[118] within the meaning of s. 24(d) of the *1999 Constitution*. It may be argued that since corporations take benefits under that *Constitution* (which benefits would seem, from the wordings of the *Constitution*, to be meant for natural persons), they are bound to observe the duties imposed by the *Constitution* even though, admittedly, some of these duties (like the one in s. 24(d)) would seem to be addressed

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regime appears to be the most convenient and appropriate means of achieving the 'common good of the community' as envisaged by the *Constitution*.

[118] See the *1999 Constitution*, ss. 25, 26, & 27.

to natural persons. The argument is that since corporations commonly enjoy the benefits and rights enshrined in that *Constitution* such as the fundamental rights guaranteed under Chapter V, they are bound to observe the duties stipulated therein.

There is however some authority to support the view that corporations qualify as citizens within the meaning of s. 24(d) of the *1999 Constitution* and are, therefore, bound to observe the provisions of that section. This is so because ss. 25, 26 and 27 of the *Constitution*, which defines citizenship, uses the word 'person.' Although the word 'person' is not defined in that *Constitution*, by virtue of s. 318(4) thereof, the *Interpretation Act*[119] applies for the purposes of interpreting its provisions. Section 18(1) of the *Interpretation Act* defines a person as including "any body of persons corporate or incorporate." In effect, unlike the Canadian approach, Nigerian constitutional jurisprudence permits recourse to the *Interpretation Act* in interpreting the *Constitution*.[120]

Regrettably however, Chapter II of the *Constitution* which includes ss.16, 17, and 24 is non-justiciable. The *Constitution* expressly preclude the law courts from entertaining any issue or question as to whether any act or omission by any authority or person is in conformity with the provisions of that Chapter of the *Constitution*.[121] The said Chapter is therefore a mere directory having no binding force in law.

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[119] Cap. 192, Laws of the Federation of Nigeria, 1990.

[120] See the *1999 Constitution*, s. 318(4) which provides thus: "The Interpretation Act shall apply for the purposes of interpreting the provisions of this Constitution." See also, s. 329(4) of the *Constitution of the Federal Republic of Nigeria 1989* for a similar provision.

[121] See s. 6(6)(c) thereof.

V. Self Regulation by the Oil and Gas Companies

The above analysis concentrated on the need for (1) statutory regulation of corporate activity, and (2) the empowerment of other corporate constituencies such as the host communities and Non-governmental organisations with the aim of promoting corporate responsibility in Nigeria. However, it should be realised that no matter the level to which corporate activity is regulated, a lot still depends on the self-regulation of the corporations if corporate responsibility is to be enhanced in Nigeria.

There is some evidence indicating that the oil companies are moving towards voluntary self regulation. In 1997, for example, the Royal Dutch / Shell group, apparently as a result of the international criticisms which trailed its alleged role in the 1995 Ogoni crisis, updated its Statement of General Business Principles.[122] That Statement recognises Shell's "areas of responsibility" as including responsibility to shareholders, customers, employees, those with whom they do business and the society. The Royal Dutch / Shell states that the responsibility of its member-companies to the society is:

> to conduct business as responsible corporate members of society, to observe the laws of the countries in which they operate, to express support for fundamental human rights in line with the legitimate role of business and to give proper regard to health, safety and the environment consistent with their commitment to contribute to sustainable development.[123]

On its part, Chevron states that its corporate policy "emphasizes safe operations, compliance, pollution prevention and community programs" and that it "works continuously with governments to develop environmental protection safety regulations."[124]

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[122] Human Rights Watch, *supra* note 111 at 182.

[123] *Ibid.*

However, abstract declarations in corporate policy statements, though commendable, are not enough. The oil and gas companies must not only actively implement their stated social policy objectives but more importantly, they must be seen to be doing so by the communities in which they operate. The idea is that "corporate strategy should involve very purposive efforts aimed at preventing or reducing" instances of environmental degradation "not only by way of maintenance of equipment but also by investing in research aimed at introducing effective abatement technologies."[125] In regards to human rights, the oil companies should ensure that Nigerian security personnel assigned to guard their facilities conform with international human rights standards in their dealings with the communities. Towards this end, it is incumbent on the companies to either take some steps (such as screening such security personnel) to ensure that the security personnel are respectful of human rights or obtain some assurance from the government in that regard.[126] In attempting to meet such challenges, the companies could introduce some quality control measures such as designating a particular director(s) to monitor compliance with human rights standards by the security personnel.

The oil companies should also engage in sustained dialogue and consultation with their host communities as part of their self-regulatory technique.[127] The companies should consult with the communities on any proposed corporate activity which is likely to negatively impact the communities. Through such consultations, the companies will know, first hand, what the objection of the communities to the proposed corporate activity is and thus better able to deal with the concerns of the communities.

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[124] Chevron, "Protecting the Environment" online <http://www.chevron.com/newsvs/currentissues/nigeria_parabe/ > date accessed: 26 September, 2001.

[125] A. Guobadia, *supra* note 44 at 479.

[126] Human Rights Watch, *supra* note 111 at 179 - 180.

It is however suggested that instead of the individual self-regulatory approach presently adopted by the oil and gas companies in Nigeria, a single, industry-wide approach, in the form of a uniform code of conduct, should be adopted. This approach would ensure that the Nigerian oil and gas sector has a uniform standard of social responsibility.

VI. Conclusion

In this chapter, I sought to demonstrate that the present state of Nigerian company law statute, that is, the *Companies and Allied Matters Act*, on the concept of corporate social responsibility is less than satisfactory. Hence, the lingering corporate responsibility crisis in the oil and gas producing communities.

Whilst economic imperatives require that all economic resources with which Nigeria is endowed be explored and exploited so as to ensure the economic and political health of the country, the public and social interests of Nigerians also demand that those resources be exploited in ways not detrimental to their health and human rights. In other words, the bounty of the oil genie need not destroy those who possess the magic lamp.[128] Therefore, it is suggested that the CAMA provisions and mechanism for ensuring corporate responsibility be strengthened so as to facilitate their efficiency. Additionally, it is suggested that the CAMA should be amended to (1) prescribe a mandatory corporate social responsibility regime with clearly defined procedural rules for enforcement, and (2) allow representatives of non-shareholder constituencies (in the form of a general public director) sit on the boards of large public companies. Law, as an instrument of social change, must ensure that corporations solve problems which are in fact created by them. Besides, Nigerian circumstances, interests, needs and experiences require corporate accountability and social responsibility.

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[127] It would appear that Shell has realised the potency of such dialogue as it has started what it calls 'Stakeholders Consultation Workshop'. See Shell Petroleum Development Company of Nigeria Limited, *People and Environment: Annual Report 1999* online <http://www.shellnigeria.com/frame.asp?Page=news > date accessed: 26 September, 2001.

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[128] M. F. Strong, Forward to *Onshore Impact of Offshore Oil*, (New Jersey: Applied Science Publishers Ltd., 1981) viii.

CHAPTER 4

EXTERNAL REMEDIES: TOWARDS ENSURING AND PROMOTING GLOBAL CORPORATE RESPONSIBILITY

I. Introduction

Chapter 3 considered the CAMA corporate responsibility provisions and mechanisms. It offered some suggestions for reform to wit: the strengthening of the Corporate Affairs Commission, the enlargement of company directors' duties to include an obligation to consider the interests of the host communities, and the restructuring of the boards of large public companies to include representatives of non-shareholder constituencies.

This Chapter examines two issues viz: (1) the avenues open to shareholders in Canada to exact greater social responsibility, including improved human rights practices, by companies in which they hold shares, and (2) whether multinational corporations can be held liable under the civil laws of their home countries or *lex domicilii* for complicity in human rights violations committed outside those countries. In doing so, however, the Chapter shall be restricted to the corporate and civil laws and regulations of Canada and the United States.

The Chapter is divided into two broad parts. Part II examines the role of the shareholders in ensuring and promoting corporate responsibility especially in relation to social issues such as the respect for and observation of good human rights practices by corporations in which they own shares. It attempts to explore the corporate laws and regulations of Canada with a view to ascertaining whether they afford the shareholders any meaningful opportunity to influence corporate management. Emphasis, in this regard, is placed on the Shareholder

Proposals Rule. This Part thus aims to achieve the objective of analysing the shareholder proposals rule under Canadian corporate law[1] with a view to demonstrating that the rule, if properly streamlined, could serve as a veritable tool in the hands of the shareholders of Canadian corporations not only to partake in corporate governance but also to hold such corporations to a higher standard of corporate responsibility in or outside Canada and thus may enure to the benefit of citizens of countries such as Nigeria.

Part III examines whether multinational corporations can be held liable under the civil laws of the United States and Canada for complicity in torts and human rights violations committed outside those countries.

II. Role of the Shareholders in Ensuring and Promoting Corporate Responsibility: An Analysis of Shareholder Proposals Rule

The Shareholder Proposals Rule gives the shareholders, subject to some exceptions, the right to request that a corporation distribute, at the expense of the corporation, a proposal touching on a matter(s) of concern to the shareholders, to other shareholders so that the matter could be debated and voted on at the annual general meeting of the shareholders. A shareholder proposal includes a corresponding statement in support of the proposal, if any.[2] The rule is meant to give a greater voice, within certain limits, to shareholders in the corporation's affairs.[3]

The rule stimulates debate and provides shareholders with the ability to influence corporate behaviour.[4] It is, in effect, a mechanism through which shareholders can hold corporate management accountable for its actions.[5] Thus, the shareholder proposals rule, if properly invoked by the shareholders, can be used to ensure corporate responsibility and consequently to promote the observance of social issues and concerns. In particular, shareholders of the multinational oil and gas corporations whose corporate activities have led to and continues to lead to social disequilibrium and human rights violations in Nigeria's oil and gas producing communities can, through the shareholder proposals rule, try to ensure that these corporations are socially responsible in their corporate activities. Commenting on the usefulness of the shareholder proposals rule, Professor Crete posits that:

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[1] The CAMA provisions on shareholder proposals shall also be briefly analysed in this chapter.

[2] CBCA s. 137(3). See also the United States' Securities and Exchange Commission, *Code of Federal Regulations*, 17 s. 240.14a-8, (2000) at 163.

[3] R.V.W. Dickerson et al., *Proposals for a New Corporations Law for Canada* (Ottawa: Information Canada, 1971) paragraphs 273 - 279 (hereinafter "Dickerson Report").

> (t)he success of the proposal rule lies rather in the opportunity granted to shareholders to express their concerns regarding certain issues and to challenge some of managements's policies and operations. Not only does this process enable stockholders to be enlightened on certain controversial questions but it also allows them to force management to justify its position concerning these matters. Such disclosure or simply the perspective of having to disclose some facts, may incite management to alter its policies or behaviour.[6]

a. Shareholder Proposals Rule under the *Canada Business Corporations Act*

Shareholders proposals under the *Canada Business Corporations Act* (hereinafter "the CBCA") though modelled on Rule 14a-8 made pursuant to the *Securities and Exchange Act*

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[4] Industry Canada - Corporate Law Policy Directorate, *Canada Business Corporations Act Supplement to Discussion Paper: Proposals for Technical Amendments* (July 1996)) at 20, para. 84.

[5] T. A. DeCapo, "Challenging Objectionable Animal Treatment with the Shareholder Proxy Proposal Rule" (1988) U. Ill. L. Rev. 119 at 138. See also, L. Sadat-Keeling, "The 1983 Amendments to Shareholder Proposal Rule 14A-8: A Retreat from Corporate Democracy?" (1984) 59 Tul. L. Rev. 161 at 164 where she asserts that the rule was meant to address two things, viz,(1) the need to hold large corporations and their managers accountable to the society for their actions, and (2) the proper role of the shareholders within a socially accountable corporate governance system.

[6] R. Crete, *The Proxy System in Canadian Corporations - A Critical Analysis* (Montreal: Wilson & Lafleur, Martel, 1986) at 194.

1934 of the United States of America, have at least one noticeable difference. Whereas in the United States the Securities and Exchange Commission has the role of an informal arbiter which vests in it the duty of determining the proper interpretation of the rule and the propriety or otherwise of corporate management's exclusion of shareholders' proposals from the proxy solicitation materials,[7] the CBCA invokes the judicial system in the determination of those issues.[8]

Under s. 137(1) CBCA,[9] a shareholder who is entitled to vote at an annual meeting of the shareholders may "(a) submit to the corporation notice of any matter that he proposes to raise at the meeting...; and (b) discuss at the meeting any matter in respect of which he would have been entitled to submit a proposal." At the request of a shareholder, a corporation is enjoined by the CBCA to include in the management proxy circular or attach thereto a statement by the shareholder of not more than two hundred words in support of the proposal as well as the name and address of the shareholder making the request.[10]

Like Rule 14a-8 of the United States,[11] s. 137 of the CBCA provide shareholders the tool with which to communicate with one another on matters affecting their common interest(s) at the expense of the corporation. That section "is based on the proposition that shareholders are entitled to have an opportunity to discuss corporate affairs at shareholders meeting."[12] What is thus conferred on the shareholders by s. 137 of the CBCA is a right, not a privilege to be accorded at the pleasure of management.[13]

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[7] See *Securities and Exchange Act, 1934*, s. 14.

[8] See s. 137(8) of the CBCA which grants the court powers, on the application of a shareholder aggrieved by a corporation's refusal to include a proposal in a management proxy circular, to restrain the holding of the meeting to which the proposal is sought to be presented. The court may also make further order(s) as it thinks fit. On the other hand, s. 137(9) thereof empowers the court to make an order permitting the corporation to omit a proposal from the proxy circular if satisfied that the proposal falls within the exceptions in s. 137(5). See also, s. 131(8)&(9) of the *Alberta Business Corporations Act* (hereinafter "the ABCA") for similar provisions.

[9] See s.131 of the ABCA for an identical provision.

[10] CBCA s. 137(3).

[11] Code of Federal Regulations, s. 240.14a (2000).

i. Exceptions to the Rule under the CBCA

As in the United States, there are exceptions to the right of the shareholders to have their proposals included in the corporation's proxy circular under the CBCA.[14] These exceptions are based on "shareholder status, timing and content"of the proposals.[15] I shall limit myself to an examination of two of those exceptions, which by their wide and apparently all-embracing nature would appear to have a dramatic impact on the efficacy of the shareholder proposals rule as a mechanism to influence corporate governance.

i.i Exclusion of Proposal on Ground of Personal Grievance or Primarily Promoting General Causes

Under s. 137(5)(b) of the CBCA, a corporation is not required to include a shareholder proposal in its proxy circular if:

> it clearly appears that the proposal is submitted by the shareholder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the corporation or its directors, officers or security holders, or *primarily* for the purpose of promoting *general* economic, political, racial, religious, social or similar causes. (Emphasis added)

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[12] W. Gray, *The Annotated Canada Business Corporations Act 1996* (Scarborough: Carswell, 1996) at 267.

[13] *Ibid.*

[14] CBCA s. 137(5)(a)-(e).

[15] Austin J. in *Re Varity Corporation and Jesuit Fathers of Upper Canada* (1987), 59 O.R. (2d) 459 (H.C.J.) at 460.

Although the CBCA does not ascribe any specific meaning to the words 'primarily' and 'general' as used in the above subsection, those words, are the key to the proper interpretation of the subsection. The first part of the subsection poses no interpretational problems as its meaning is tolerably plain. Under that part, a company is permitted to exclude, from its proxy materials, a proposal that is primarily meant for the ulterior purpose of advancing personal claims or personal grievances.

The second part of the subsection, that is, the phrase "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes" appears ambiguous and too wide in scope. It would seem to be an effective bar on shareholders proposals which involve social issues such as the observation of human rights by corporations and consequently, has negative impact on the potency of shareholders proposals.[16] Put bluntly, there is caselaw to suggest that s.137 (5) (b) permits management to refuse to include in its proxy circular a shareholder proposal which seeks, for example, to end the corporation's practices alleged to violate human rights.

Indeed, in *Re Varity Corporation and Jesuit Fathers of Upper Canada,*[17] two shareholders of Varity Corporation (the Jesuit Fathers of Upper Canada and the Ursuline Religious of the Diocese of London, Ontario) had put forward a proposal that the company end its investment in the then apartheid South Africa and requested the company to include same in its proxy circular for distribution to shareholders for the annual general meeting. The company took objection to the content of the proposal. Consequently, it filed an application before the Ontario High Court for an order permitting it to exclude the proposal from its proxy circular. Its argument relied on s. 131(5)(b) of the *Canada Business Corporations Act*, 1974 - 75, which is on all fours with the present s. 137(5)(b) of the CBCA. Management contended that the proposal was submitted primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes and in particular, the abolition of apartheid in South Africa. By way of contrast, to the shareholders, the proposal had an exact goal in that it was directed at the company's specific business investment in South Africa and their desire was to have the company terminate such investment. The shareholders insisted that apartheid contributes to the maintenance of an unstable and undesirable business climate from which the company should withdraw.

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[16] See Industry Canada - Corporate Law Policy Directorate, *supra* note 4 at 22 para. 93.

[17] *Supra* note 15. See also, *Greenpeace Foundation of Canada & Inco Ltd., Re* (1984), 24 A.C.W.S. (2d) 176 where the Ontario High Court held that s. 137 (5) (b) CBCA permits corporate management to exclude a proposal which seeks to advance an environmental cause such as instituting pollution control measures to limit sulphur dioxide emissions. That decision was affirmed by the Ontario Court of Appeal. See (1984), 25 A.C.W.S. (2d) 149 (Ont. C.A.).

In granting the order sought by the company, Austin J. held:

> I agree that the proposal has a specific purpose and that the purpose is directly relevant to Varity....The language of the proposal and the supporting statement leave me in no doubt that the primary purpose of the proposal is the abolition of apartheid in South Africa. As I read the legislation, the fact that there may be a more specific purpose or target does not save the proposal. That more specific purpose here is the withdrawal of Varity. The legislation makes it clear that if the primary purpose is one of those listed, however commendable either the specific or general purpose may be, the company cannot be compelled to pay for taking the first step towards achieving it. In other words, the company cannot be compelled to distribute the proposal.[18]

The shareholders, not satisfied with the decision, appealed to the Ontario Court of Appeal. That court, by a majority, affirmed Austin J. without providing an insight into the basis of their decision.[19] In his dissenting judgement, Tarnopolsky J.A. took a different view of the matter. To him:

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[18] *Supra* note 15 at 462.

> the issue of apartheid in south Africa and its nefarious effects on investment in that country by the respondent cannot be a "general economic, political, racial, religious, social or similar cause; it must be considered "specific" in the sense of being "exact" or "particular" as opposed to "general" in the sense of "universal" or "unbound."[20]

With due deference to Austin J. and the Justices of the Court of Appeal who affirmed him, Justice Tarnopolsky's dissenting view seems to represent a more supportable interpretation of s. 137(5)(b) of the CBCA. There was enough evidence before the trial court which showed the specific nature of the proposal. The supporting statement indicated clearly that Varity corporation engaged, through its subsidiary (Perkins Diesel Engines, U.K.), in the manufacture of military engines and equipment and that Varity was unable to make any commitment that those military equipment would not be used by the apartheid government and or its agencies in the enforcement of apartheid laws. The primary purpose of the proposal was therefore not the abolition of apartheid in South Africa (which, in any event, Varity Corporation had no powers to effect), but the specific withdrawal of Varity from apartheid South Africa since apartheid, in the words of Tarnopolsky J. A., had "nefarious effects on investment in that country."[21]

In the face of such facts, it is surprising that both Austin J. and the majority of the Ontario Court of Appeal held the proposal to be general in its content and therefore excludable from the company's proxy circular. I submit, with due deference, that a proper interpretation of s. 137(5)(b) of the CBCA should take into account not only the wordings of the proposal but also the evidence in support of such proposal as deducible from the supporting statement. A proposal which would ordinarily seem general in nature may be shown to be specific when the supporting statement is considered contemporaneously with the proposal.

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[19] See *Re Varity and Jesuit Fathers of Upper Canada* (1987), 60 O.R. 640 (Ont. C.A.).

[20] *Ibid.*

[21] *Re Varity and Jesuit Fathers of Upper Canada, supra* note 19 at 640.

The key to the proper interpretation of the phrase under consideration here are the words 'primarily' and 'general'. Consequently, the court should consider two issues - (1) the primary purpose of the shareholder in putting forth the proposal, and (2) the nature of the proposal, that is, whether the proposal is general or specific.

The CBCA gives no clue as to how the court is to determine the primary purpose of the shareholder. Whilst it is conceded that s. 137(5)(b) CBCA permits the exclusion of proposals which are general in nature, it is submitted that proposals which are specific cannot be excluded from the company's proxy materials where the proposals are primarily aimed at promoting specific economic, political, racial, religious, social or similar causes. As held by Tarnopolsky J.A., a proposal must be considered to be 'specific' once it is shown to be 'exact' or 'particular.' On the other hand, a proposal is general if it is 'universal or 'unbounded.'[22] The proposal in the *Varity* case was not only specific but exact.

In effect, there is a good argument that s. 137(5) (b) does not, *ipso facto*, preclude proposals merely because such proposals raise 'economic, political, religious, social or similar causes.' Proposals raising such causes or issues can only be properly excluded under that subsection if they are general in nature. Proposals touching on those causes or issues in specific terms cannot therefore be validly excluded under that subsection. Austin J. and the majority in the *Varity* appeal court seem, regrettably, not to have appreciated this point.[23]

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[22] *Ibid.*

i.ii Exclusion on Ground of Abuse of Shareholders' Right

The second exception, for our purpose in this thesis, is found in s. 137(5)(e). Under that subsection, a company is not required to comply with s. 137(2) and (3) of the CBCA if "the rights conferred by this section are being abused to secure publicity." In other words, a company is allowed to exclude a shareholder proposal from its proxy circular if the rights conferred on the shareholders by s.137 are being abused by the shareholder(s) in that their purpose is to secure publicity. This again appears to be an effective bar on shareholders' proposals raising social policy issues, which by their very nature, tend to attract wide publicity and public debate.

Section 137(5)(e) of the CBCA is fraught with interpretational and implementational difficulties as the CBCA does not ascribe any particular meaning to the word 'abused' as used in the subsection though it does suggest misuse or otherwise perverting the purpose of the shareholder proposals rule. Yet, there is an argument that any shareholder proposal simply touching on social issues such as the corporation's human rights or environmental practices would attract publicity and therefore be excluded[24] irrespective of how "commendable either [its] specific or general purpose may be."[25]

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[23] The interpretation of s. 137(5)(b) of the CBCA is admittedly fraught with difficulties. That subsection is not only ambiguous but appears, with due respect, to have been inelegantly drafted. The second leg of that subsection is particularly so. As I mentioned earlier, s. 137(5)(b) permits the exclusion of shareholders proposals from the proxy circular if "it clearly appears that the proposal is submitted by the shareholder...primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes." No doubt, a proposal whose primary purpose is the promotion of 'general' economic, political, racial, religious, social or similar causes is excludable under the subsection. What then is the position if the proposal is aimed not primarily, but secondarily, at the promotion of those causes in either general or specific terms? Is it to be assumed that such proposals are saved and therefore not excludable under the subsection?

There appears to be grounds to make that assumption. It is a cardinal principle in the interpretation of statutes that the express mention of one thing is the exclusion of the other, the maxim being *expressio unius est exclusion alterius*. See *Re Medical Centre Apartments Ltd. and City of Winnipeg* (1969), 3 D. L. R. (3d) 525 (Man. C.A.) Therefore, since s. 137(5)(b) expressly mentioned the words 'primarily for the purpose,' it could be argued that proposals for all other purposes, other than those purposes that can be said to be primary, are permitted under the subsection and therefore not excludable. There appears to be no direct case law authority on this point in Canada. Experience in the United States has shown the difficulties associated with the interpretation of the exception, hence the Securities and Exchange Commission replaced it in 1983 with the economic significance test.

It is clear however that for a proposal to be excluded under s. 137(5)(e), two elements must be present contemporaneously. First, there must be an abuse of the rights conferred by s. 137. Second, that abuse must be for the specific purpose of securing publicity. An abuse for any other purpose will, in my considered opinion, not suffice. This is clear from the wordings of the subsection.

The question then arises: how is the company and invariably the court to determine the intention of the shareholder(s) in putting forth a proposal? As mentioned earlier, social policy proposals naturally attract publicity. This may be so even if the shareholder(s) proposing same does not intend such publicity. That being so, such proposals are wont to be viewed by corporate managers as a means of securing publicity and therefore excludable from the proxy circular.

Given the extreme vulnerability of s. 137(5)(e) to being used for improper purposes by corporate management, it is submitted that the subsection should have been couched in such a manner that the phrase "to secure publicity" is not included in it. Further, the CBCA or the Regulations thereto[26] should have attempted to provide a definition of the word 'abused' for the purpose of the interpretation of s. 137(5)(e). It is suggested that such definition should be restrictive in nature by identifying specific items that would amount to abuse. Although such a definition would, to some extent, affect the flexibility of the ambit of the exception, the advantage of certainty which comes with the definition would seem to outweigh whatever benefit derivable from the present flexibility of the exception.

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[24] It has been suggested that s. 137 of the CBCA should be amended to require a corporation seeking to reject a proposal to justify, to a special review agency why a shareholder proposal is excluded. See, D. Conacher & C. Forcese, "Making Corporations More Open and Accountable: Coalition Wants Barriers to Shareholder Activism Removed" online <http://www.policyalternatives.ca/> date accessed: 16 October, 2001. As already noted, in the U.S.A., the appropriateness or otherwise of the exclusion of a shareholder proposal is determined by the Securities and Exchange Commission. See, the U.S. *Securities and Exchange Commission Act, 1934*, s. 14a.

[25] Austin J. in *Re Varity Corporation and Jesuit Fathers of Upper Canada, supra* note 15 at 462.

Indeed, a learned author opines that perhaps because of the relative broad construction of the exceptions to the shareholder proposals rule, the rule is rarely invoked in Canada.[27]

b. Principal Arguments for and Against the Rule

Proponents of the shareholders proposal rule have advanced several arguments in its favour. The rule is said to be a veritable tool for improving corporate management decision-making process as it encourages corporate democracy and consultation. A Shareholder proposal as well as the subsequent debates and votes on it by shareholders at the annual general meeting invariably amount to shareholders consultation in the corporate decision-making process.[28] It offers a broader horizon of ideas to corporate management thereby improving the quality of decisions reached.

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[26] See *Canada Business Corporations Regulations, C.R.C, c.424*

[27] J. A. VanDuzer, *The Law of Partnerships and Corporations* (Ontario: Irwin Law, 1997) at 195. See also, C. McCall & R. Wilson, "Shareholder Proposals: Why Not in Canada? (1993) 5 Corp. Governance Rev. which reveals that in a study of 480 public corporations in Canada between 1990 and 1992, only one shareholder proposal was submitted.

Proponents have also pointed to the rule's accomplishments particularly on social issues as reason for its relevance and retention. Evidence exist to suggest that the rule has helped in effecting vital social policies. For, example, some writers have credited the rule with disinvestment in the then apartheid South Africa.[29] Such disinvestment contributed, in part, to the eventual dismantling of that obnoxious system in the country.

Evidence also exists to suggest that even in cases where corporate management has refused to include social policy shareholder proposal in the company's proxy circular, or the proposal, even though so included, is defeated at the annual general meeting, such proposal may yet have a tremendous influence on corporate management policy and decision. It is not uncommon for corporate management to make some concessions to address the concerns of the shareholder(s) making the proposal.[30] This may sometimes be in consideration of the withdrawal of such proposal by the shareholder(s).

On the other hand, the rule has been attacked and criticised on several grounds. Principal amongst such grounds is the argument that the rule places too much financial cost on companies. In this regard, social policy proposals have been identified by some opponents of the rule as placing the more damaging costs on companies.[31] This criticism is commonly referred to as the 'free-rider problem.' When a system affords participants an incentive to place costs on other participants in the system at little or no cost to themselves, there is no impetus to hold back and a free rider problem is said to arise.[32] Given that the costs of implementing the rule have "never truly been assessed,"[33] a fact conceded by some opponents of the rule,[34] the free-rider criticism is at best premature for being undemonstrated.

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[28] P. J. Ryan, "Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy" (1988) 23 Ga. L. Rev. 97.

[29] See D. E. Schwartz & E. J. Weiss, "An Assessment of the SEC Shareholder Proposal Rule" (1977) 65 Geo. L.J. 635 at 643.

[30] For example, as D. E. Schwartz & E. J. Weiss, *ibid* at 646 points out, in the early to the mid 1970s, the group Project on Corporate Responsibility submitted several proposals to General Motors Corporation. One of those proposals sought to broaden the board of directors of the corporation by including therein a female consumer expert, an environmental professor, and a black community leader. This proposal was strongly opposed by the board of General Motors and was consequently defeated. However, within three years of that defeat, the corporation added a woman, an eminent scientist and a black community leader to its board of directors and created a Public Policy Committee made up of outside directors.

Contrary to the assertions of the rule's proponents who readily point to its accomplishments particularly on social policy issues, opponents of the rule criticise the rule as offering no tangible benefits, the argument being that "the benefits of the rule are grounded in rhetoric, not in reason, and are, in all probability non-existent."[35] This argument appears, with due respect, to be short-sighted. Benefits of the rule include increased shareholder communication, increased accountability by management, increased compliance with human rights (as in South Africa) and possible improvement in the corporation's environmental and or human rights practices. To the extent that the corporation secures a reputation as a good corporate citizen, it is unlikely to be targeted for boycott. By way of contrast, companies which are unsolicitious of their reputations risk a backlash. Talisman Energy Incorporated has, for example, been subjected to boycott calls for its controversial involvement in the exploration of oil in the Sudan.[36]

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[31] S. W. Liebeler, "A Proposal to Rescind the Shareholder Proposal Rule" (1984) 18 Ga. L. Rev. 425 at 454.

[32] *Ibid* at 438 - 39.

[33] M. Mueller, "The Shareholder Proposal Rule: Cracker Barrel, Institutional Investors, and the 1998 Amendments" (1998) 28 Stetson L. Rev. 451 at 476.

[34] See S. W. Liebeler, *supra* note 31 at 466 where she states that the "costs are unknown."

[35] *Ibid.*

In today's economic landscape, the average investors and consumers are becoming increasingly socially conscious.[37] The result is that the investing and buying public now, more than ever before, base their investment and purchase decisions on social issues. It is therefore not difficult to fathom that a shareholder proposal which seeks to promote social policy issues, (such as proposals requiring that a company not hire child-labourers) may, depending on corporate management's attitude to it, enhance corporate profits. Where management agrees with such proposal and actively implements it, the public perception of the company would likely be thereby boosted. This, in turn, may lead to more investment and increase in the sale of its goods and services and consequently profits. The reverse may readily be the case if management were to disregard such proposal. That shareholder proposals can afford tangible economic benefits to the corporation therefore seems clear.

c. Bill S-11: Amendments to the Shareholder Proposals Rule under the CBCA

The Parliament of Canada passed Bill S-11 (hereinafter "the Bill") in June 2001 which seeks to amend some of the provisions of the CBCA including the shareholder proposals rule.[38] Although the Bill has not yet become law,[39] the amendment to s.137 CBCA proposed therein, are commendable though not entirely satisfactory to shareholders' rights activists. In some respect, however, the proposed amendment represents a considerable victory for shareholders and shareholders' rights activists. For our purpose in this thesis, the amendments are significant in two main ways. These are (1) eligibility of shareholders to submit proposals, and (2) the abolition of the exception permitting the exclusion of proposals on ground of being for the primary purpose of promoting general causes contained in the second leg of s. 137(5)(b).

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[36] See B. McKenna, "Report Urges U.S. Government to Bar Talisman from Issuing Stock" *The Globe & Mail*, (2 May, 2000) reproduced online <http://www.vitrade.com> date accessed: 30 October, 2001; L. Miller, "Group Call for Stock Boycott to Prevent Slavery" *The Associated Press*, (28 July, 1999) reproduced online <http://www.anti-slavery.org> date accessed: 30 October, 2001.

[37] Large investors such as TIAA-CREF (arguably the world's largest Pension Fund) and California Public Employees' Retirement System were said to have divested their holdings in Talisman Energy Inc. and refrained from purchasing PetroChina stock apparently as a result of the controversy surrounding the business alliance between those corporations and the dictatorial government in the Sudan. See, Freedom House Centre for Religious Freedom, "Freedom House Urges Boycott of PetroChina & Talisman: Religious Genocide in Sudan is Directly Fuelled by Greater Nile Pipeline Joint Venture" online <http://www.freedomhouse.org> date accessed: 30 October, 2001.

i Eligibility to Submit a Shareholder Proposal

Under s. 137(1) of the CBCA, only a "shareholder entitled to vote at an annual meeting of shareholders" may submit a proposal to the corporation. As held by the Supreme Court of Canada in *Verdun v. Toronto Dominion Bank*[40] that subsection precludes a beneficial owner of shares from submitting a proposal. To correct the perceived injustice done to beneficial owners of shares as a result of s. 137(1) CBCA, the proposed amendment grants "a registered holder or beneficial owner of shares that are entitled to be voted at an annual meeting of shareholders"[41] the right to submit proposals to the corporation subject to certain conditions. To be eligible to submit a proposal, a person

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[38] See Bill S-11, *An Act to Amend the Canada Business Corporations Act* (hereinafter "Bill S-11") online <http://strategis.ic.gc.ca/SSG/c100192e.html>

[39] Bill S-11 will become law as soon as the Canadian Federal Executive Cabinet adopts the accompanying regulations. For a draft of the Regulations, see *Canada Gazette Part 1, (Vol. 135, No. 36), Saturday, September 8, 2001*, (Ottawa: Queen's Printer, 2001) at 3447 or online <http://strategis.ic.gc.ca/sc_mrksv/corpdir/engdoc/7.html>.

[40] [1996] 3 S. C. R. 550 (S.C.C.).

[41] Bill S-11, *supra* note 38, s. 137 (1).

> a. must be, for at least the prescribed period, the registered holder or beneficial owner of at least the prescribed number of outstanding shares of the corporation; or
> b. must have the support of persons who, in the aggregate, and including the person that submits the proposal, have been, for at least the prescribed period, the registered holders, or beneficial owners of, at least the prescribed number of outstanding shares of the corporation.[42]

Thus, whereas under the present s. 137(1) CBCA only a shareholder entitled to vote at the shareholders meeting is allowed to submit a proposal, Bill S-11 grants registered holders and beneficial owners of shares to which a right to vote at the annual shareholders' meeting is attached a right to submit proposals. The Bill thus reverses *Verdun v. Toronto Dominion Bank*.[43]

In one significant respect, however, the Bill places new and severe restrictions on shareholders' right to submit proposals. Whereas under the present CBCA a shareholder who owns just one voting share is allowed to submit proposals,[44] Bill S-11 will only allow a person to submit a proposal if that person has been a registered holder or beneficial owner of "at least the prescribed number" of shares "for at least the prescribed period."[45] The "prescribed number of shares" and the "prescribed period" are as stipulated in s. 47 of the proposed Regulations to the CBCA[46] which provide that:

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[42] Bill S-11, *ibid* s. 137(1.1).

[43] *Supra* note 40. Note that the British Columbia Supreme Court recently followed *Verdun v. Toronto Dominion Bank* in *Trumpeter Yukon Gold Inc. v. Omni Resources Inc.*, [1999] B.C.J. No. 897 (QL),.

[44] See CBCA s. 137 (1) read together with s. 140(1). Under the latter section, "each share of a corporation entitles the holder thereof to one vote at the meeting of shareholders." Section 137(1) gives a "shareholder entitled to vote at an annual meeting of shareholders" the right to submit a proposal.

[45] Bill S-11, *supra* note 38, s. 137(1.1)(a).

[46] For a draft of the proposed Regulations to the CBCA, see *supra* note 39.

> (f)or the purpose of subsection 137(1.1)...of the Act,
> (a) the prescribed number of shares is the number of voting shares
> (i) that is equal to 1% of the total number of the outstanding voting shares of the corporation as of the day on which the shareholder submits a proposal, or
> (ii) whose market value, as determined at the close of business on the day before the shareholder submits the proposal to the corporation, is at least $2000; and
> (b) the prescribed period is the six-month immediately before the day on which the shareholder submits the proposal.

The Corporate Law Policy Directorate explains the rationale behind this restriction on shareholders right to submit proposals thus:

> (t)he eligibility requirements for shareholder proposals are designed to curtail abuse by requiring that those who put the corporation and other shareholders to expense of including a proposal in its proxy material have had a continuous minimum level of investment in the corporation for a specific period of time.[47]

The proposed eligibility rule would appear, with respect, to draw the hands of the CBCA clock backwards in respect of the eligibility of shareholders to submit proposals since it places an economic barrier on the right of the shareholders to submit proposals as against the present CBCA regime which automatically attaches the right to submit a proposal to the ownership of a voting share. It would thus seem, by implication, to reverse the decision of the Quebec Superior Court in *Michaud v. National Bank of Canada.*[48]

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[47] Corporate Law Policy Directorate, *Summary - Part 12 (Shareholders)*, Online <http://strategis.ic.gc.ca/SSG/cl00192e.html > at 11.

[48] [1997] R.J.Q. 547 (Que. S.C.). In that case, the plaintiff who held minimal shares in the defendant banks (Royal Bank and National Bank) submitted a proposal which requested, amongst others, that the overall remuneration of the highest paid executive officer of each of the banks not exceed 20 times the average salary of the banks' employees, to the banks for inclusion in the banks' proxy circulars. The banks refused to include the proposal hence the plaintiff instituted an action pursuant to s. 144(2) of the *Bank Act* which contains similar shareholder proposals provisions as s. 137 of the CBCA. The banks argued, amongst others, that since the plaintiff held only very few shares in each bank (plaintiff only had one share in Royal Bank), the proposal was properly excluded and that the plaintiff could not therefore be said to be sufficiently aggrieved by the exclusion. The court held, while describing the banks' argument as 'paternalistic', that the plaintiff had standing to institute the action as he was sufficiently aggrieved since the banks' refusal to circulate the proposal denied him the only realistic means available to contact other shareholders. The court directed the banks to include the proposal along with the supporting statement in their management proxy circulars. After an unsuccessful appeal to the Quebec Court of Appeal, the banks complied with the Superior Court's order.

The above observation notwithstanding, there is a clear need to strike a fair balance between the interest of the corporation and those of its shareholders, a balance which appears to have been struck by the proposed eligibility restrictions. Those restrictions appears to have been meant to assuage the legitimate concerns of corporate management about the danger posed by unrestricted shareholder proposals. The efficiency of corporate management may be adversely affected if they were to be inundated with numerous shareholder proposal requests which an unrestricted shareholders' right to submit proposals may encourage. [49]

Bill S-11 attempts to cushion the negative effects of the new eligibility rule on minor shareholders by permitting them to pool their share-holdings together so as to meet the minimum requirements for the submission of a proposal.[50] While it may be considerably difficult for a minor shareholder to find other shareholders who are willing to team-up with him or her to present a proposal, the advent of the internet as an effective medium of communication should serve to ameliorate such difficulty.[51] Bill S-11 thus seems to strike a

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The shareholders voted on the proposals in 1997, though the proposal was defeated. See, B. R. Cheffins, "*Michaud v. National Bank of Canada* and Canadian Corporate Governance: A "Victory for Shareholder Rights?" (1998) 30 C.B.L.J. 20 at 45 - 46.

[49] It was the contention of corporations, in their submissions to the Corporate Law Policy Directorate, that often "non-serious investors use the proposal mechanism to promote a social, economic or personal agenda unrelated to the business of the corporation." Consequently, the new eligibility requirements are meant to "address the concern raised by corporations that individual shareholders who have not manifested a genuine interest and stake in the affairs of the corporation still have access to this mechanism." See, Corporate Law Policy Directorate, *supra* note 47 at 11.

[50] Bill S-11, *supra* note 38, s. 137(1.1)(b).

[51] Note however that the expenses, effort and time involved in sourcing other shareholders might dissuade minor shareholders. Besides, even where a minor shareholder is able to source other shareholders, the pooled shareholdings must, under s. 47(b) of the proposed Regulations, also have been held by all the shareholders for a minimum period of six months immediately before the day on which the proposal is submitted. There is therefore a danger that Bill S-11 might result in the shutting out of minor shareholders from utilizing the shareholder proposal mechanism.

fair balance, in terms of the *eligibility* to submit a proposal, between the legitimate concerns of corporate management and the right of the shareholders to partake in corporate governance. It would seem to be premised on the fact that management have to deal primarily with the concerns of shareholders who have something beyond a minimal interest in the corporation.

ii. Abolition of Exclusion of Proposals on Ground of Primarily Promoting General Causes

With the exception of a few minor changes, Bill S-11 retains the exceptions in s. 137(5) CBCA. The most profound change is the abolition of the second leg of s. 137(5)(b) under which a corporation is permitted to exclude a proposal if it is "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes." In its place the Bill introduces the "relevant / significant business or affairs" exception into the CBCA jurisprudence. Under it, a corporation may exclude a proposal from its proxy materials if "it clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation."[52] This appears to set the bar high - could a shareholder propose a non-investment policy in companies who do business in Sudan, for example, if that shareholder's company held only a minor stake in such companies? This would be an unfortunate but entirely possible outcome.

All said, Bill S-11 may well represent only a partial victory for both the corporation and the shareholders. While it enlarges the category of shareholders eligible to submit proposals, it places severe economic barriers on the ability of minor shareholders to utilise their right to submit proposals and severely limits what kind of proposal can go forward.

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[52] Bill S-11, *supra* note 38 s. 137(5)(b.1).

d. Are Shareholder Proposals Adopted by Shareholders Binding on Corporate Management?

It seems debatable whether shareholder proposals, even if adopted by shareholders at general meetings, are binding on management. There are two differing views on the bindingness of adopted proposals although s. 137 of the CBCA is silent on the issue. On the one hand, there is the view that proposals on subjects which fall within shareholders' powers under the CBCA are binding on management.[53] This would be so if the proposal is adopted as a by-law or a unanimous shareholder agreement since the CBCA makes it mandatory for "every director and officer of a corporation" to "comply with this Act, the regulations, articles, *by-laws and any unanimous shareholder agreement.*"[54] A contrary view holds that adopted proposals are not binding on management. A notable proponent of the latter view submits that:

> unfortunately, s. 137 does not authorize the shareholders in a general meeting to do anything with respect to the proposal. They are free to discuss it, vote on it, change it as they see fit - but unless they are given the power under some other section to make the proposal into a by-law, then it remains what it was: just a proposal.[55]

Another writer provides some seemingly convincing justification for this view thus:

> This resolution nevertheless may not be binding. The difficulty is that in a corporation where the board of directors has the power to manage the business, the directors are not obliged to implement a resolution if the matter falls within the scope of their managerial authority....This means that if a shareholder proposal deals with matters of a managerial nature ..., a resolution approving the proposal is unlikely to be binding. Instead, it can only be "advisory" or "precatory" in nature. Correspondingly,

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[53] Industry Canada - Corporate Law Policy Directorate, *supra* note 4 at 21 paras. 85 - 87.

[54] CBCA s. 122(2).

[55] B. Welling, *Corporate Law in Canada* (Toronto: Butterworths, 1991) at 475.

the corporation's board of directors can refuse to entertain the resolution, even if it is framed as a mandate or a directive.[56]

Whilst it may seem that resolutions which fall within the scope of management powers are not binding on management, there are exceptions to this notion. For example, under ss.99 and 116 of the Ontario *Business Corporations Act* (hereinafter "the OBCA"), shareholders' proposals which make, amend or repeal a corporation's by-law are deemed to be effective from the date of the adoption. Consequently, in Ontario, the bindingness of a proposal on an OBCA corporation is dependent on whether the proposal is categorized as a by-law.[57] If the proposal is not properly the subject matter of a by-law then the directors would not be bound by it.[58]

However, in view of the checks and balances between the shareholders and corporate management inherent in corporations law, it is unlikely that management would disregard a proposal adopted by shareholders even if it relates to a matter or matters over which the shareholders have no powers. The directors may fear that the shareholders might replace them if they neglected such adopted proposals.[59]

e. The Shareholder Proposals Rule: A Perspective

Given the great damage to human rights and the environment which corporations can cause in this age of globalization, corporate law must aid the shareholders of corporations in putting a brake on such activity. Clearly, at the time the shareholder proposals rule was conceived, formulated and enacted, the legislature could not have foreseen the present economic reality of corporate globalization and its effects on social issues such as human rights and the environment. In view of the rapidity and tenacity with which corporations are globalizing their operations, the negative impact of corporate globalization on social issues particularly in the developing countries will likely increase. Indeed, Chapter 2 of this thesis has underscored such problems in Nigeria.

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[56] B. R. Cheffins, *supra* note 48 at 36 - 37.

[57] Industry Canada - Corporate Law Policy Directorate, *supra* note 4 at 21 para. 89.

[58] *Ibid.* Note however that the Alberta Law Reform Commission, while acknowledging that some ambiguity exist in this area, is of the view that proposals to make a by-law would be effective. See, Alberta Law Reform Commission, *Draft Report No. 2: Proposals for a New Business Corporation Law for Alberta* (Edmonton: Institute of Law Research and Reform, 1980) at 57.

[59] B. R. Cheffins, *supra* note 48 at 37.

That being the case, the shareholder proposals rule in the countries of registration or *lex domicilii* of the corporations should be liberalised to permit shareholders to put forth proposals on social policy issues. Such liberalization should take into consideration the present economic reality of corporate globalization and its effects on social issues. It is also thought that the judiciary, in determining matters concerning the shareholder proposals rule, might do well to heed the advice of the Quebec Superior Court in *Michaud v. National Bank of Canada*[60] that legislative provisions governing shareholders proposals should be construed in a manner which fosters shareholder participation at general meetings.

The proposed amendment to s. 137(5)(b) CBCA[61] is a step in the right direction since it broadens the category of shareholders entitled to submit proposals and would, *inter alia*, permit social policy proposals which are sufficiently significant and related to the operations of the company even if such proposals are for the purpose of promoting general social causes. It, thus, appears to be aimed in the direction of liberalization.[62] This is assuming that the word "significant" signals an important matter and not simply a "numbers game" or quantitative matter. Such liberalization of the exceptions would ensure that the shareholder proposals rule is a viable mechanism for curbing corporate management excesses while maintaining management rights. If such mechanisms for checking and balancing corporate operations are not put in place, corporate globalization, which though admittedly benefits the corporation, its shareholders in the form of increased corporate profits and shareholder value and the host country, might invariably turn out to be a "race to the bottom" in the area of corporate social policy and practice.

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[60] *Supra* note 48 at 8, 11 - 13.

[61] It need be pointed out that Rule 14a-8 of the United States contained a similar exception as s. 137(5)(b) of the CBCA prior to 1983. In that year, primarily as a result of the difficulties associated with its interpretation, the SEC amended the Rule and replaced the exception which permitted companies to exclude a shareholder proposal on the ground that it 'primarily promotes general economic, political, racial, religious, social or similar causes' with the economic significance test.

Save for the phrase "to secure publicity" as used in s. 137(5)(e) of Bill S-11, that is, the exception which permits exclusion of proposals on ground of abuse of shareholder rights, and the phrase "in a significant way" in s. 137(5)(b.1) thereof, the proposed amendment to the CBCA shareholder proposals rule would seem to represent an ideal position.

f. The Imperativeness of Additional Medium for Shareholders Communication and Discussion.

In their present form, the effectiveness of the shareholder proposals rule under the CBCA, unamended, as a mechanism for ensuring corporate responsibility and accountability to the shareholders would seem debatable. It has been said that the rule impede, rather than facilitate, shareholder participation in corporate governance.[63] Some others have opined that the complicated and convoluted history of the rule in the United States has prevented it from ensuring corporate accountability to the shareholders.[64] Consequently, a SEC Commissioner has suggested that the grounds for exception should be substantially decreased and that both the economic significance and ordinary business exceptions be eliminated in the United States.[65]

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[62] See Department of Industry, "Canada Business Corporations Regulations, 2001: Regulatory Impact Analysis Statement" *Canada Gazette, Part 1, (Vol. 135, No. 36) Saturday, September 8, 2001* (Ottawa: Queen's Printer, 2001) at 3443.

Section 137(5)(b)&(e) of the CBCA may have effectively rendered the rule unattractive to shareholders hence little resort is had to the rule in Canada.[66] Consequently, very little case law authority exist on the rule in Canada.[67] Indeed, as at 1997, only one shareholder proposal resolution had been successfully passed in Canada.[68] For these reasons, the proposed amendments to the CBCA are salutary.

Beyond these amendments, perhaps, the time is ripe for shareholders to evolve additional methods of putting across and discussing their views with other shareholders on matters of common concern to them prior to their annual meeting. Modern telecommunications techniques will be of tremendous help in this regard. Shareholders information-dissemination and discussion can be done through the publication of periodic newsletters, pamphlets or newspapers.[69] It might be worthwhile for shareholders of large public corporations to organise themselves into shareholders association(s) with the aim of funding the publication of such newsletters or newspapers.[70] The publications should however be at regular intervals in order to ensure proper dissemination of ideas before each annual meeting of shareholders.

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[63] C. D. Ball, "Comment, Regulations 14A and 13D: Impediments to Pension Fund Participation in Corporate Governance" (1991) Wis. L. Rev. 175.

[64] C. L. Ayotte, "Re-evaluating the Shareholder Proposal Rule in the Wake of Cracker Barrel and the Era of Institutional Investor" (1999) 48 Catholic Univ. L. Rev. (No. 2) 511 at 521.

[65] S. M. H. Wallman, "Reflections on Shareholder Proposals: Correcting the Past; Thinking of the Future," in (1997) *970 Preparation of Annual Disclosure Documents* 419 at 427 - 32.

[66] J. A. VanDuzer, *supra* note 27; C. McCall & R. Wilson, *supra* note 27. A learned writer reports that in 1997, at least five corporations circulated shareholder proposals in Canada. See. B. R. Cheffins, *supra* note 48 at 48.

[67] B. R. Cheffins, *supra* note 48 at 37. As Professor Cheffins points out, at the time of the writing of his article, only four cases had been litigated in Canada in respect of the shareholder proposals rule. These cases are: *Verdun v. Toronto-Dominion Bank, supra* note 40; *Greenpeace Foundation of Canada v. Inco Ltd., supra* note 17; *Varity Corp. v. Jesuit Fathers of Upper Canada, supra* note 15; and *Cappuccitti v. Bank of Montreal* (1989), 46 B.L.R. 255 (Ont. H.C.J.). See also the recent judgment of the British Columbia Supreme Court in *Trumpeter Yukon Gold Inc. v. Omni Resources Inc., supra* note 43.

[68] B. R. Cheffins, *supra* note 48 at 47.

Shareholders, particularly those who are socially conscious, might also need to explore the internet as a medium for the exchange of ideas and discussion. Shareholders of large public corporations may, for example, register a domain name or website through which they are not only kept updated about the activities of the corporation but more importantly, about issues of common concern to them. Through such internet devices, the shareholders can discuss matters of common concern prior to the shareholders' annual meeting by posting messages and responding to messages from other shareholders.[71] Such prior shareholders discussion will, in turn, avail the shareholders of a more immediate alternative to the right granted them by s. 137(1)(b) CBCA and its successor under which a shareholder entitled to vote at an annual meeting of shareholders may "discuss at the meeting any matter in respect of which he would have been entitled to submit a proposal."[72]

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[69] See, for example, *The Prospectus*, a newsletter of the Shareholders Association for Research and Education (SHARE) published both in prints and online. See online < http://www.share.ca >.

[70] The Corporate Responsibility Coalition proposes the formation of a watchdog group to promote shareholders' rights. It suggests that such group is to be formed by the government requiring corporations to include a one-page pamphlet in their mailings to shareholders, which pamphlet would invite shareholders to join and form such a watchdog group for an annual fee of about $30. With the membership and funding, the group would then be able to help shareholders in the areas of filing complaints, law suits, shareholder proposals and lobbying for shareholder democracy measures. See, D. Conacher & C. Forcese, *supra* note 24.

[71] See G. P. Kobler, "Commentary: Shareholders Voting Over the Internet: A Proposal for Increasing Shareholder Participation in Corporate Governance" (1998) Ala. L. Rev. 673.

g. The Shareholder Proposals Rule under the CAMA

Section 235 of the CAMA titled 'Circulation of Members' Resolutions' contain provisions akin to the shareholder proposals rule under s. 137 of the CBCA.[73] Section 235(1) of the CAMA provides thus:

> subject to the following provisions of this section, it shall be the duty of a company, on the requisition in writing of such number of members as is hereinafter specified and (unless the company otherwise resolves) at the expense of the company to -
> (a) give to members of the company entitled to receive notice of the next annual general meeting notice of any resolution submitted by a member which may properly be moved and is intended to be moved at that meeting;
> (b) to circulate to members entitled to have notice of any general meeting sent to them, any statement of not more than 1,000 words with respect to the matter referred to in any proposed resolution or the business to be dealt with at that meeting, and where the statement has more than 1,000 words to circulate a summary of it.

There are however some restrictions placed on the right of the company's members to submit a members' resolution under the CAMA. The number of members necessary for a requisition under s. 235(1) is (a) any one or more members representing not less than one twentieth of the total voting rights of all the members having, at the date of the requisition, a right to vote at the meeting to which the requisition relates; or (b) not less than one hundred members holding shares in the company on which there has been paid up an average sum, per member, of not less than Five Hundred Naira.[74]

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[72] Note that this right under s. 137(1)(b) of the CBCA is different from the shareholders' right to submit a proposal under s. 137(1)(a).

[73] Note that the CAMA shareholder proposals rule have no bearing on the central focus of this thesis. The multinational oil and gas companies, whose corporate activities in Nigeria's oil and gas producing communities form the basis of this thesis, are owned by non-Nigerian shareholders. Consequently, Nigerian shareholders cannot in anyway influence the activities of those companies. This point explains why the CAMA shareholder proposals rule provisions were not discussed in the previous chapter.

Section 235(2) of the CAMA appears to set the bar high in respect of the eligibility of shareholders to requisition a resolution. In large public companies, it may be considerably difficult to source members who hold one twentieth of the voting rights as stipulated under s. 235(2)(a) so as to qualify to submit a requisition. However, it is considered that whatever barrier may have been erected by that requirement is somewhat ameliorated by s. 235(2)(b) under which not less than 100 members who hold shares on which there has been paid up an average sum of 500 Naira per member may collectively requisition a resolution.

In respect of the eligibility of minor shareholders to submit proposals under the CAMA, the author realises that even though s. 235(2) permits them to pool their shareholdings together so as to qualify to requisition a resolution, such minor shareholders would potentially face considerable difficulty in sourcing other shareholders. This is because, unlike Canada where access to and use of the internet is widespread, Nigerians generally have very limited access to the internet. Besides, most Nigerians are not computer literate. Therefore, communication between Nigerian shareholders could be considerably more difficult than the position in Canada. It is however thought that the potential harm which an unrestricted shareholder right to requisition a resolution could visit on the corporation - distraction of corporate management as a result of an avalanche of shareholder requisitions - outweighs whatever difficulty or inconvenience minor shareholders would suffer as a result of the restriction.

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[74] CAMA s. 235(2). Five hundred Naira would amount to approximately $6.00 Canadian currency.

Like the CBCA, the CAMA contains exceptions to the right of a company's member to requisition a resolution at the expense of the company. First, s. 235(1) permits the company, by resolution, to elect not to circulate a member's requisition for a resolution at its expense. The CAMA does not however stipulate what kind of resolution would suffice for this purpose. Presumably, a simple resolution supported by a majority of the shareholders would suffice.

Second, a company is not bound to comply with s. 235(1) unless (a) a copy or copies of the requisition duly signed by the requisitionists is delivered to the company at its registered office not less than 6 weeks before the meeting in the case of a requisition requiring notice of a resolution; and (b) not less than one week before the meeting in the case of any other requisition.[75]

Third, a company may omit a requisitioned resolution from its proxy materials unless "there is deposited or tendered with the requisition, a sum reasonably sufficient to meet the company's expenses in giving effect thereto."[76] This requirement appears to place a severe economic barrier on the right of the shareholders to requisition a resolution. It is however not clear if that requirement is to be met in all cases. This is because s. 235(1) places a duty on the company to circulate a proposed resolution at its expense "unless the company otherwise resolves." It is thought that the requirement unduly restricts the shareholders' right to requisition a resolution. Consequently, it is suggested that it should be expunged, through an amendment, from the CAMA.

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[75] CAMA s. 235(4)(a). This is, however, subject to the proviso to s. 235(4)(a) of the CAMA. It is to the effect that if, "after a copy of a requisition requiring notice of a resolution has been deposited at the registered office of the company, an annual general meeting is called for a date 6 weeks or less after the copy has been deposited, the copy though not deposited within the time required by this subsection shall be deemed to have been properly deposited for the purposes thereof."

[76] CAMA s. 235(4)(b).

Fourth, where, on the application to the court either by the company or any other person who claims to be aggrieved, the court is satisfied that the rights conferred by s. 235 of the CAMA are "being abused to secure needless publicity for defamatory matter," the company shall not be bound to circulate the requisition.[77] Thus, unlike s. 137(5)(e) of the CBCA, s. 235(5) of the CAMA would appear to qualify the requisite abuse. The abuse under the CAMA must be "to secure needless publicity for defamatory matter." Consequently, it is considered that a requisition could not validly be excluded under this exception if it attracts publicity without being "for defamatory matter." It is however the court that determines this issue under s. 235(5) of the CAMA.

Apparently to deter shareholders from making frivolous requisitions, s. 235(5) of the CAMA permits the court to make an order requiring the requisitioning shareholder(s) to pay the company's costs, in part or in whole, on an application brought under that subsection notwithstanding that the requisitioning shareholder(s) is /are not party(ies) to the application.

Where, however, the requisitioning shareholders (1) deposits "a sum reasonably sufficient" to meet the expenses involved in the distribution of the requisition in accordance with s. 235(4)(b) of the CAMA, (2) satisfy the eligibility and procedural requirements in ss. 235(2) and 235(4)(a) respectively and, (3) are not abusing their right "to secure needless publicity for defamatory matter," the company is obligated by s. 235(1) to distribute the requisitioned resolution. Indeed, failure of the company to do so amounts to an offence on the part of its officers under s. 235(7) of the CAMA.

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[77] CAMA s. 235(5).

In two significant respects, s. 235 of the CAMA differs from s. 137 of the CBCA as amended by Bill S-11. First, s. 235(7) of the CAMA makes it an offence, on the part of corporate managers, not to comply with s. 235. That subsection provides that:

> in the event of any default in complying with the provisions of this section, every officer of the company who is in default shall be guilty of an offence and liable to a fine of #500.

Second, the CAMA does not restrict the matters in respect of which shareholders may requisition a resolution. It does not contain exceptions such as the exclusion of proposals on grounds of primarily promoting general causes, neither does it require that the proposal must relate in a significant way to the operations of the company. Presumably therefore, the CAMA permits requisitions on all subjects, including social policy issues, so long as they are related to the affairs of the company.

Thus far, it has been suggested that a liberalised version of the CBCA shareholder proposals rule may enure to the benefit of Nigerians as regards Canadian corporations who do or might, in future, do business in Nigeria. It is thought that such liberalised shareholder proposals rule would permit Canadian shareholders a better avenue to ensure that corporations are socially responsible inside and outside Canada. Additionally, it has been argued that the CAMA require amendment in relation to the provision in s. 235(4)(b) which demand shareholders to deposit "a reasonably sufficient sum to meet the company's expenses" when submitting a requisition for a resolution.

The following section explores what the law in countries such as Canada and the United States can do to prevent or dissuade corporations registered or doing business therein from engaging or participating in human rights or environmental violations abroad.

III. Holding Multinational Companies Liable under the Laws of United States and Canada for Complicity in Human Rights Violations Abroad

In this part of the present Chapter, I attempt an analysis of some of the laws of the countries of registration or *lex domicilii* of some multinational companies with a view to ascertaining whether such laws afford any protective umbrella for victims of human rights violations in which the companies may be complicit. In this regard, I shall concentrate on the laws of the United States and Canada. Although Canadian oil and gas companies are not in any way involved in the violation of human rights in Nigeria, evidence exist to suggest that at least one Canadian company, that is, Talisman Energy Incorporated, is complicit in human rights violations in the Sudan in circumstances similar, if not identical, to what obtains in Nigeria's oil and gas producing communities.[78] Consequently, there is a ranging debate presently as to whether Canadian companies can be held liable in Canada under Canadian civil law for complicity in human rights violations committed outside Canadian shores. This analysis may shed remedial light on the situation in Nigeria.

a. Liability of Multinational Companies under the United States Civil Law for Human Rights Violations Committed outside the United States

In the recent past, there has been an upsurge in civil litigation against multinational companies under the United States civil laws for alleged human rights violations or complicity in human rights violations committed outside the shores of the United States. That upsurge is, in part, due to the absence of a binding international code of corporate conduct[79] in relation to social policy issues such human rights, labour rights and the environment and the existence of specific statutes enabling such suits in the United States.

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[78] See, for example, *Human Security in Sudan: The Report of a Canadian Assessment Mission*, (Ottawa: Department of Foreign Affairs and International Trade, 2000), also available online < http://www.dfait-maeci.gc/foreignp/menu-e.asp.> date accessed: 11 November, 2000. See also, Amnesty International, *Sudan: The Human Price of Oil* online< http://www.amnesty.org/alib/aipub/2000/AFR/15400100.htm.> date accessed: 6 July, 2001.

i. Statutory Basis for Corporate Liability for Rights Violations Committed outside the United States

The principal statutory authorities on which suits alleging corporate complicity in rights violations committed outside the United States are predicated are the *Torture Victim Prevention Act*[80] (hereinafter "the TVPA") and the *Alien Tort Claims Act*[81] (hereinafter "the ATCA").

The TVPA expressly vests jurisdiction in U.S. federal courts in matters touching on some specific aspects of international human rights abuse. The Act creates liability where under the 'color of law' of any foreign nation, an individual is subjected to torture or extra-judicial killing.[82] The TVPA "recognises ... that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of United States domestic law."[83] The ambit of the remedies available under the TVPA extends to aliens and U.S citizens alike. This is deducible from the word 'individual' as used in the Act.[84]

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[79] B. A. Frey, "The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights (1997) 6 Minn. J. Global Trade 153 at 157.

[80] 28 U.S.C. s.1350 App., 1991.

[81] 28 U.S.C. s. 1350

[82] *Wiwa v. Royal Dutch Petroleum Company & Shell Transport and Trading Company Ltd.*, 226 F.3d 88; (2000) U.S. App. LEXIS 23274; 31 ELR 20166 (hereinafter cited to LEXIS). The TVPA defines 'extra-judicial killing' as a deliberate killing not authorised by a judgment of a court affording all the judicial guarantees which are recognised as indispensable by civilized peoples. Thus, it seems clear that an execution carried out pursuant to the judgment and or sentence of a military-style tribunal against whose judgment or sentence there is no right of appeal, as in the case of Mr. Ken Saro-Wiwa, qualify as extra-judicial killing for the purposes of the TVPA.

[83] *Wiwa v. Royal Dutch Petroleum, ibid* at 17.

For liability to attach to the corporation in such a case, the alleged torture or extra-judicial killing must have been carried out under the 'color of law' of the foreign nation. This requirement, as shall soon be evident, represents a potentially difficult hurdle for a plaintiff. A corporation would therefore be liable under the TVPA if it is established that it engaged or participated with a foreign government or its agent(s) in torture or extra-judicial killing. Such participation with the foreign government is enough to establish the 'color of law' requirement.

On its part, the ATCA provides that:

> (t)he District Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.[85]

As with the TVPA, a U.S corporation or a corporation, not being a U.S corporation but whose activities are sufficiently connected with the United States, could be liable under the ATCA if it participates with a foreign government in the commission of a tort(s) "in violation of the law of nations."

ii. Procedural and Substantive Obstacles to Suits under the TVPA and ATCA

Enormous procedural and substantive obstacles stand in the way of a successful litigation under both the TVPA and ACTA for human rights violations or for torts allegedly committed outside the United States by private parties. Hence, all but a few cases brought under those Acts particularly under the ATCA against private defendants have, for a variety of procedural reasons, been dismissed at the preliminary stage. In respect of the ATCA, a learned commentator has attributed this trend to "a combination of vague statutory language and judicial interpretation imposing a state action requirement for most claims."[86]

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[84] See H.R. Rep. No. 102-367 (1991) at 4, reprinted in (1992) U.S.C.C.A.N. 84, 86.

[85] 28 U.S.C. s. 1350.

ii.i Procedural Obstacles

Procedurally, a plaintiff who claims against private defendants under these statutes may, if raised by the defendants, face one or two issues which may have the potentials of defeating the suit at the onset. These issues are whether (1) the U.S courts have jurisdiction over the defendant, and (2) the U.S is the appropriate forum in which to institute the action. The latter issue is encompassed in the common law doctrine of *forum non conveniens.* Whilst these procedural issues pose little or no hindrance to suits against United States registered corporate defendants whose businesses are substantially carried out in the United States, they nevertheless pose enormous obstacles to suits against corporations not registered in the United States and or whose businesses are, in the main, carried out outside the United States.

ii.i.i Jurisdiction over Foreign Defendants under the TVPA and ATCA

In determining the jurisdiction of the United States court over a non-United States defendant, the court considers constitutional concerns on due process as encompassed in the First Amendment of the United States Constitution. Those constitutional due process concerns are satisfied if the non-United States defendant has some minimum contacts with the

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[86] B. J. Kieserman, "Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act" (1999) 48 Catholic Univ. L. Rev. 881 at 888.

United States such that the maintenance of the suit in the United States court does not offend traditional concepts of fair play and substantive justice.[87] Consequently, two requirements must be met in order to satisfy the due process concerns. First, the foreign defendant must have some contacts with the United States so as to render it subject to that forum's jurisdiction, and second, the jurisdiction so invoked must be reasonable.[88]

Minimum contact with the United States is enough to confer either general or specific jurisdiction on the court. Where the defendant's activities in the United States are substantial, continuous and systematic, the United States court would have general jurisdiction.[89] Such general jurisdiction is available to subject a foreign defendant to a suit even on matters unrelated to its, his or her contacts with the United States.[90] In this regard, the activities of United States- based agent of a foreign defendant may, in appropriate circumstances, be enough evidence of the requisite minimum contact as to confer jurisdiction on U.S. courts. In *Wiwa v. Royal Dutch Petroleum,*[91] for example, the court assumed general jurisdiction over the foreign defendants on the basis of the activities of the defendants' Investor Relations Office in New York. It is enough to confer general jurisdiction if the agent "renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available."[92]

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[87] *John Doe I v. Unocal Corporation*, 248 F.3d 915; (2001) U.S. App. LEXIS 7691; *International Shoe Co. v. State of Washington,* 326 U.S. 310, 316, 90L. Ed. 95, 66 S.Ct. 154 (1945).

[88] *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1 F.3d 848, 851 (9th. Cir. 1993).

[89] *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446, 96L. Ed. 485, 72 S.Ct. 413 (1952).

[90] *Ibid.*

[91] (2000) U.S. App. LEXIS 23274.

On the other hand, the U.S. courts are conferred with specific jurisdiction over a foreign defendant if the defendant's contacts with the U.S. give rise to a course of action.[93] Specific jurisdiction arising from the foreign defendant's contact is determined by applying a three-way test. These are whether (1) the defendant has done some act or consummated some transaction within the U.S. or performed some act by which it purposefully availed itself of the privilege of conducting activities in the U.S. thereby invoking the benefits and protection of its laws, (2) the claim is one that arises out of or results from the defendant's U.S-related activities, and (3) the exercise of jurisdiction is reasonable in the circumstances.[94]

ii.i.ii *Forum Non Conveniens*

The doctrine of *forum non conveniens* permits a court, in appropriate cases, to dismiss a suit even though the court is a permissible venue with proper jurisdiction over the suit.[95] In determining whether a suit should be dismissed on this ground, a two-way test is applied by the court. The first test is whether an adequate alternative forum exist. If such a forum exist, the court then considers whether on the basis of a series of factors, such as the residence and private interests of the parties, the dictates of public interests, the place where the cause of action arose, a trial in the forum chosen by the plaintiff would better serve the interest of justice than a trial in the alternative forum.

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[92] *Wiwa. v. Royal Dutch Petroleum, ibid* at 8-9. The facts of this case are discussed at pages 196 - 198 *infra*.

[93] *John Doe 1 v. Unocal, supra* note 87. See also, *Hanson v. Denckla*, 357 U.S. 235, 250-253, 2L. Ed. 2d. 1283, 78 S.Ct. 1228 (1958).

[94] *Gordy v. Daily News*, L.P., 95 F.3d 829, 831-32 (9th Cir. 1996)

[95] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 91 L.Ed 1055, 67 S.Ct. 839 (1947).

Although the courts accord a plaintiff's choice of forum with substantial deference,[96] once the defendant satisfies the court that a consideration of the relevant factors tilts strongly in favour of trial in the foreign forum, the court would dismiss the claim on ground of *forum non conveniens*.

There are considerable difficulties facing victims of human rights violations perpetrated by dictatorial and autocratic foreign governments or their agents together with some private party(ies) in instituting suits in both their countries of origin and in the foreign forum for such rights violations. Such victims, for a variety of reasons, may not be able to sue their government and the private party(ies) in their own countries for those violations. For one thing, the judicial systems of such countries are usually controlled by the dictatorial governments. Consequently, a fair trial cannot be guaranteed. Even where those judicial systems are fairly independent, victims who are bold enough to institute actions in their domestic courts against their government would, by so doing, expose themselves to reprisals from the government. In some other cases, as was the case in Nigeria during military rule, the military could, by Decree, oust the jurisdiction of the court to adjudicate on the matter. The *Wiwa* court appreciated these difficulties when it held:

> one of the difficulties that confronts victims of torture under color of a nation's law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place. It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are

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[96] See *Wiwa v. Royal Dutch Petroleum*, *supra* note 91.

brought."[97]

It is respectfully submitted that for the purposes of the TVPA and the ATCA, the court, in deciding on *forum non conveniens*, particularly in cases alleging the violation of human rights, must take into account the likelihood of reprisals against the plaintiff(s) by his / her country's government if the action were instituted in their home country. Where there is a real likelihood of such reprisals, the court should assume jurisdiction to determine the claim as to do otherwise would leave the victim with virtually no remedy.

The procedural obstacles discussed above plagued the plaintiffs in *Wiwa v. Royal Dutch Petroleum Company Limited and Shell Transport and Trading Company Ltd.*,[98] a case which incidentally arose from the human rights situation in Nigeria's oil and gas producing communities.[99] In that case, the defendants are joint controllers and operators of the Royal Dutch/Shell Group, an international, vertically integrated network of affiliated oil and gas companies one of which is Shell Petroleum Development Company Limited, a wholly owned subsidiary of the defendants. The plaintiffs, some of whom are Nigerian emigres in the United

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[97] *Supra* note 91 at 19.

[98] *Supra* note 91.

[99] See also, *Bowoto v. Chevron Corporation*, Case No. C99 - 2506 CAL which is presently pending before the United States District Court for the Northern District of California. The plaintiffs therein are Nigerians resident in the oil and gas producing region of the country. They allege that the defendant, in conjunction with and in concert with Nigeria's military and police, wilfully, maliciously and systematically violated their human rights, including summary execution, torture, cruel, inhuman and degrading treatment. In particular, the plaintiffs allege that the grievous harm suffered by them were inflicted by a combination of the Nigerian military and police personnel who were acting at the behest of, and with the support, cooperation and financial assistance of the defendant. They allege further that the defendant's personnel participated alongside the Nigerian military in the attacks on their peaceful protests at the Parabe oil platform in May, 1998 and at the villages of Opia and Ikenyan in January, 1999 as a result of which several of the plaintiffs lost their lives while others sustained serious injuries. For the Plaintiffs' Statement of Claim in the above mentioned case, see online <http://www.humanrightsnow.org/CCR_IHR/CHEVRON.COM.html> date accessed: 3 September, 2001.

States, alleged that the defendants engaged in extensive oil exploration and development activity in the Ogoni region of Nigeria through their said subsidiary and, in the process, participated directly and indirectly with the Nigerian government in the violation of their fundamental rights. Specifically, the plaintiffs alleged that they and their next of kin were imprisoned, tortured, and killed by the Nigerian government in violation of the laws of nations at the instigation of the defendants, in reprisal for their political opposition to the defendants' oil exploration activities on their land. They alleged that Shell Nigeria recruited the Nigerian military and police to attack local villages and suppress organised opposition to its oil and gas development activities resulting in the detention and torture of some of them and trial by military tribunal and eventual execution by hanging of their next of kin by the Nigerian government.[100] One of the plaintiffs, a woman identified simply as Jane Doe to protect her safety, alleged that she was beaten and shot by the Nigerian military during a raid upon her village.[101]

According to the plaintiffs, whilst these abuses were carried out by the Nigerian government and military, Shell Nigeria instigated, directed, orchestrated, planned and facilitated the abuses. As evidence of this, they alleged that Royal Dutch/Shell Group provided money, weapons and logistic support to the Nigerian military, including the vehicles and ammunition used in the raids on the villages.[102]

At the District Court, the defendants raised objections to the suit and prayed the court to dismiss it on the grounds that the New York court had no jurisdiction over them and on *forum non conveniens.* The U.S district court for the Southern District of New York, whilst holding that it had jurisdiction over the matter, dismissed it on ground of *forum non conveniens*. On appeal, the U.S. Court of Appeals for the Second Circuit allowed the appeal, holding that the District Court failed to properly consider and accord the necessary deference to the choice of a U.S forum by the plaintiffs some of whom were U.S. residents. It also held that the District Court, in arriving at its decision, did not give proper consideration to the interests of the United States in providing a forum for the adjudication of claims alleging human rights abuses. Remarkably, the U. S. Supreme Court recently upheld the Court of Appeal in that case.[103]

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[100] *Supra* note 91 at 5

[101] *Ibid.*

[102] *Supra* note 91 at 6.

ii.ii **Substantive Obstacles**

Aside from the procedural issues discussed above, a plaintiff under the ATCA faces two equally challenging substantive hurdles in order to successfully impute a private defendant with liability under that Act. First, the tort alleged must have been committed in violation of the law of nations. Second, the private defendant must have acted under the 'color of law' in committing the alleged tort. In other words, there must be some element of state action in the commission of the tort. The latter hurdle also confronts plaintiffs under the TVPA.

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[103] See *Royal Dutch Petroleum Company Et Al. v. Ken Wiwa Et Al.*, 121 S. Ct. 1402; 149 L. Ed. 2d 345; (2001) U.S. LEXIS 2488; 69 U.S.L.W. 3628. Note that the U. S. Supreme Court did not give any reason(s) for upholding the decision of the Court of Appeal. It simply held thus: "Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied."

ii.ii.i "Torts Committed in Violation of the Law of Nations"

The plaintiff must establish that the tort(s) allegedly committed by the defendant is /are "tort(s)...committed in violation of the law of nations." The ATCA provides no clue as to the meaning of the 'law of nations' as used therein. Consequently, there is some considerable difficulty in articulating the precise meaning of that phrase.[104] The exact scope of tortious conduct cognisable under the Act therefore remains a matter of dispute.

In determining torts in violation of the law of nations,[105] the courts rely on contemporary international law norms, that is, customary international law. Such international law norms command the general assent of civilized nations. Consequently, they are binding on all nations. In the *Paquette Habana*,[106] the court enunciated the "ancient usage" and "ripening" rules for the determination of the law of nations and relied on customary international practices which exempted the capture of coastal fishing vessels as bounties of war as evidence of an ancient usage which had gradually ripened into a rule of customary international law through the general assent of civilized nations.[107] In *Filartiga v. Pena-Irala*,[108] the court, relying on the *Paquette Habana* held that conducts or wrongs which would amount to a violation of the law of nations for the purposes of the ATCA must be (1) violations that command the general assent of civilized nations, (2) prohibited in clear and unambiguous terms, and (3) of mutual concern as opposed to general concern.[109]

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[104] It should however be pointed out that the *Restatement (Third) of the Foreign Relations Law of the United States*, s. 702 contains a list of acts or conducts which amounts to violation of the law of nations. Under that section, a nation violates international law if it practices, encourages, or condones genocide, slavery or slave trade, murder or causes the disappearance of individuals, engages in torture or other cruel, inhuman, or degrading treatment or punishment, or prolonged arbitrary detention, systematic racial discrimination, or a constant pattern of gross violations of internationally recognised human rights.

[105] Note that under public international law, there is no concept of "tort" but rather "international delict" and "international crime."

[106] 175 U.S. 677 (1900).

[107] *Ibid* at 686.

[108] 630 F. 2d 876 (2d. Cir. 1980).

Some scholars have attempted to expand the scope of the ATCA beyond the *Paquette Habana* and *Filartiga.* Scholars such as Blum and Steinhardt have opined that the ATCA covers torts that are (1) definable, (2) universal, (3) obligatory and (4) the object of concerted international attention.[110] Increasingly, the courts have adopted these four factors in determining actionable torts under the ATCA.[111]

ii.ii.ii State Action Requirement

Apart from establishing that the alleged tort(s) was/were committed in violation of the law of nations, the plaintiff under both TVPA and ATCA is almost always saddled with the additional duty of proving the existence of state action in the commission of the tort(s). Although not expressly required by the language of the ATCA, the courts have imported the state action requirement into the ATCA jurisprudence because "international law itself imposes such a requirement."[112]

With the exception of a limited instances where the tort alleged is one of a handful of crimes to which the law of nations attribute individual or personal responsibility such as war crimes, genocide, or slavery,[113] private individuals and corporations are not responsible under the TVPA and ATCA for torts and human rights violations, even if they are committed in violation of the law of nations, unless the state action requirement is satisfied. In other words, the individual or corporate defendant's conduct must amount to a 'state action' in order to invoke liability under the statutes.

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[109] *Ibid* at 881 - 888.

[110] See J. M. Blum & R. G. Steinhadt, "Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After *Filartiga v. Pena-Irala*" (1981) 22 Harv. Int'l. L.J. 53 at 87 - 90.

[111] See *Tel-Oren v. Libya Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984).

[112] D. S. Morrin, "People Before Profits: Pursuing Corporate Accountability for Labor Rights Violations Abroad Through the Alien Tort Claims Act" (2000) 20 B.C. Third World L. J. 427. See also, *Tel-Oren v. Libya Arab Republic*, *ibid.*

The state action requirement is satisfied where the private individual or corporation acts under the 'color of law.'[114] State action, for the purposes of the TVPA and ATCA, is determined through a reliance on the jurisprudence of *42 U.S.C. s. 1983* and the tests developed by the United States Supreme Court for determining 'color of law' requirement thereunder.[115] These tests are (1) the public function test, (2) the symbiotic relationship test, (3) the nexus test, and (4) the joint action test.[116] Applying these tests, a private individual or corporation could be said to have engaged in state action "when he acts together with state officials or significant state aid."[117] Thus, state action exists "where there is a 'substantial degree of cooperative action' between the private and state actors in effecting the deprivation of rights...."[118]

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[113] See *Kadic v. Karadzic*, 70 F.3d 232, 239 - 241 (2d Cir. 1995). War Crimes, genocide or slavery are not torts but crimes under public international law.

[114] *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp.362 (E.D. La. 1997) at 374, affirmed, 197 F.3d 161 (5th. Cir. 1999).

[115] *National Coalition Government of the Union of Burma v. Unocal Corp.*, 176 F.R.D. at 344, *John Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) at 890.

[116] B. J. Kieserman, *supra* note 86 at 906-07.

[117] *Kadic v. Karadzic*, *supra* note 113 at 245.

[118] *John Doe I v. Unocal Corp.*, *supra* note 115 at 891.

However, as held in both *John Doe I v. Unocal Corporation*[119] and *National Coalition Government v. Unocal Corporation,*[120] in order to constitute state action, the private individual or corporation need not directly take part in the commission of the offending tort(s). It is enough if they knowingly benefited from the tort(s) committed in violation of the law of nations by either the foreign government with which they are contractually engaged or by other persons or bodies with significant state aid; or if they knew or were aware of the perpetration of those violations and derived a benefit therefrom.

The state action requirement places a significant limitation on the potency of the ATCA in relation to claims against corporations and private individuals. The ATCA jurisprudence is replete with cases where the court declined jurisdiction for lack of state action in the commission of an alleged tort even when it finds the alleged tort to be a violation of the law of nations.[121] Such is the case where the tortious acts are committed directly by the corporation or its agent(s) without the involvement of the foreign government.[122] In such a case, the court would readily deny jurisdiction under the ATCA for lack of state action. The ATCA jurisprudence therefore makes it clear the a corporation is not liable under that Act for tortious acts directly committed by the corporation overseas. This remains so even if such acts patently violate the law of nations.

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[119] *Supra* note 115 at 892.

[120] *Supra* note 115 at 349.

[121] See, for example, *Beanal v. Freeport - McMoran, Inc.*, *supra* note 114 , *Tel-Oren v. Libya Arab Republic*, *supra* note 113.

[122] See *Beanal v. Freeport -McMoran, ibid,* where the corporation was held not liable under the ATCA because the alleged acts constituting the tort were committed by the corporation's private security force.

It seems puzzling that corporations can escape liability under the TVPA and ATCA by directly engaging in tortious acts whilst being liable if they knowingly benefited from acts perpetrated by the foreign government or its agent(s). This dichotomy, in my view, sends a wrong signal to multinational corporations whose corporate activities are likely to result directly in the commission of tortious acts such as the violation of human rights outside of the United States. It conveys an unfortunate message that multinational corporations are permitted "to finance human rights abuses as long as nominally private agents, not uniformed foreign military forces, perpetrate them."[123] This outcome is not only "unprincipled" but "inconsistent with the purpose of the ATCA."[124]

Although the ATCA represents a laudable milestone in the quest for corporate responsibility and accountability particularly in relation to corporate activities and practices outside the United States, it does not, by itself, seek to prevent the commission of tortious acts by multinational corporations abroad. The Act merely affords alien victims of torts committed against the law of nations an opportunity to seek redress in the United States federal courts. It is therefore merely reactive.

It is my respectful submission that a better approach would have been for the Act to be pro-active. In other words, the ATCA should have expressly prohibited U.S. individuals and corporations from committing, engaging or participating in the commission of tortious act such as the violation of human rights outside the shores of the United States. This would be in keeping with the often declared avowed interest and commitment of the United States to promote human rights globally. It is clear to me, therefore, that in order to provide a more effective avenue for ensuring good corporate practices especially in the area of human rights by U.S. multinational corporations abroad, the ATCA should be amended in such a way as to make it illegal for such corporations to either engage in the violation of human rights abroad or from participating, in whatever form, with a foreign government, body or individual in the perpetration of such acts. An amendment in the manner suggested above is not without legislative precedent in the United States.[125]

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[123] B. J Kieserman, *supra* note 86 at 925.

[124] *Ibid.*

iii. Logistics of Implementation

No doubt, the TVPA and the ATCA were enacted to provide succour to foreign victims of torts and human rights violations. Laudable as this objective is, the practical significance of the statutes to the general masses of the poor and developing countries such as Nigeria who suffer rights violations in which multinational corporations are complicit would appear compromised by logistical problems. Due largely to poverty and illiteracy, the chances of such rights violation victims travelling to the United States to seek redress under the TVPA and ATCA are, in all probability, almost non-existent. This represents an enormous hindrance to the realization of the objectives of these statutes.

Perhaps, non-governmental organisations can render some assistance in this regard not only by providing and or sourcing funds for transporting foreign victims from their countries to the United States to seek redress, but also by sourcing the services of pro-bono lawyers to file and argue the cases in court. Happily, there is some evidence that in some cases litigated under these statutes, lawyers have rendered and are still rendering pro-bono legal services.[126]

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[125] See, for example, the *Foreign Corrupt Practices Act,* 15 U.S.C. s. 78 dd, 78 dd-1, 78 dd-2, 1994 which prohibits foreign bribery.

Even where the foreign victims have the financial resources to transport themselves to the United States, or there are willing sponsors for such trips, there remains the problem of the procurement of visas and residency permits in the United States. Residency is particularly important for a successful litigation under these statutes. Cases instituted under the statutes by foreign victims not legally resident in the United States are more likely to be dismissed for *forum non conveniens* than those instituted by resident U. S. aliens as the courts accord less deference to a foreign plaintiff's choice of a U. S. forum.[127] In *Re Union Carbide,*[128] for example, the plaintiffs who were Indian citizens and residents were denied access to U. S. courts on ground of *forum non conveniens.*

In order to properly implement the legislative intent behind the TVPA and ATCA, it is suggested that alien victims of rights abuses and other tortious acts abroad be accorded temporary residency in the U. S. for the purpose of seeking redress. This would ensure alien victims are not denied access to U. S. courts on technical and procedural grounds as *forum non conveniens.*

iv. Scope of Human Rights Cognisable under the TVPA and ATCA

The legislative intent behind the TVPA and the scope of human rights covered thereunder appear clear and unambiguous from the words used in the Act. The TVPA was specifically meant by the U.S. Congress to address issues bordering on international torture and extra-judicial killing and to provide a legal forum for victims of such rights abuse to seek justice.

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[126] See, for example, *Wiwa v. Royal Dutch Petroleum, supra* note 91 which is currently being handled pro-bono by lawyers of the Centre for Constitutional Rights, New York, U.S.A.

[127] See *Capital Currency Exchange, N. V. v. National Westminster Bank P.L.C.,* 155 F.3d 603, 611-12 (2d. Cir. 1998), cert. denied, 526 U.S. 1067, 119 S. Ct. 1459, 143 L. Ed. 2d 545 (1995).

[128] 809 F. 2d at 198.

Unlike the TVPA however, the original intent of the congress in enacting the ATCA and consequently, the scope of torts cognisable thereunder remain, till date, a matter of intense controversy. While some view the Act as limited in scope to such offences recognised by Congress as violating the law of nations in 1789 when it was enacted,[129]others suggest that the Act was intended by Congress to address only torts committed by crews of vessels in the course of stopping and boarding ships suspected of aiding the enemy in a time of war.[130] This controversy is fuelled, in part, by the amorphous language used in the statute coupled with the fact that until relatively recently, very few cases were litigated under the Act.

Whatever may have been the original legislative intent behind the ATCA, modern global economic, political and social realities dictate the imperativeness of adopting a progressive approach to the interpretation of the ambit and scope of the Act. It should be viewed as not only covering claims arising from the violation of human rights which occurred outside the U. S., but should also be interpreted in such a way as not to foreclose any aspect of human rights from its ambit. In other words, the scope of international human rights cognisable under the Act should not be closed. The courts have progressively adopted this approach.[131]

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[129] See *Tel-Oren v. Libya Arab Republic, supra* note 111 where the court held that the Act is limited to alien claims in relation to conducts which amount to (1) violation of safe conducts, (2) infringement of the rights of ambassadors, and (3) piracy.

[130] See J. M. Sweeney, "A Tort Only in Violation of the Law of Nations" (1995) 18 Hastings Int'l & Comp. L. Rev. 445.

It is thought that statutes such as the TVPA and ATCA could help in dissuading U.S. corporations and non-U.S corporations doing business in the U.S. from engaging or participating in human rights violations in countries such as Nigeria. Indeed, the fact that Nigerians are already seeking legal relief(s) under those statutes in the U.S courts against corporations such as Shell and Chevron for alleged infraction of human rights in Nigeria is indicative of the importance and usefulness of these statutes.

b. Liability of Corporations under Canadian Civil Law for Human Rights Violations Committed outside Canada

The question whether corporations are liable under Canadian civil law for complicity in torts or human rights violations which occur outside the shores of Canada is an open one. Unlike the United States where there are specific statutes and a considerably large volume of legal literature on the subject, there are neither specific statutes addressing the issue in Canada nor a concerted legal debate amongst Canadian academics on the issue, though this is starting.

In the recent past, due largely to the controversial relationship between Talisman Energy Incorporated, (a Calgary, Alberta based oil and gas corporation) and the dictatorial government in Sudan, the issue of complicity of Canadian corporations in the violation of human rights outside Canada has gained increased spotlight in the media. Consequently, some attention is only recently being drawn to the possibility of holding Canadian corporations liable under Canadian law for complicity in human rights abuses abroad.

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[131] See *John Doe 1 v. Unocal Corporation, supra* note 115, *National Coalition Government of the Union of Burma v. Unocal Corporation, supra* note 115 where the court extended the scope of the ATCA to cover international labour rights violations.

A legal scholar asserted recently that although there are significant obstacles in the path of a successful civil litigation against Canadian corporations under Canadian law for human rights abuses which occur outside Canada, such actions are entirely possible in Canada.[132] Craig Forcese argues that Canadian corporations who are complicit in wrongs resulting from their association with "militarized commerce" abroad are open to Canadian common law negligence action, that is, tort.[133] However, for a successful litigation in that regard, the plaintiff, as in the United States, might be faced with both procedural and substantive obstacles. Whilst the former relates to the issues of jurisdiction of Canadian courts to adjudicate such matters and the choice of law to be applied, the latter relate to the legal basis for imputing the corporation with liability.

i. Procedural Obstacles:

i.i Jurisdiction / *Forum Non Conveniens*

Canadian law, whether provincial or federal, is the primary determinant of the jurisdiction of Canadian courts to adjudicate on a case involving a foreign element.[134] Procedural common law rules may also determine jurisdiction in such cases. As a general principle, the jurisdiction of Canadian common law courts in respect of actions *in personam* is based upon the sufficiency of personal service of the originating process in the forum chosen by the plaintiff. Thus,

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[132] C. Forcese, "Deterring "Militarized Commerce": The Prospect of Liability for "Privatized" Human Rights Abuses" (1999-2000) 31 Ottawa L. Rev. 171. Although Forcese also argues that it may be possible to hold Canadian corporations criminally liable under Canadian criminal law for criminal wrongs associated with "militarised commerce" outside Canada, it is beyond the scope of this thesis to delve into that issue.

[133] *Ibid* at 209 - 210.

[134] J.G. Castel, *Canadian Conflict of Laws*, 4th ed. (Toronto: Butterworths, 1997) at 199.

> the court of a province or territory has jurisdiction to entertain an action against a defendant who was present in that province or territory at the time of the service of the originating process.[135]

The defendant's physical presence in the province or territory, temporary or permanent, at the time service of the originating process is effected on him or her is enough to confer jurisdiction on that province's or territory's court.[136] Where the course of action arose in the plaintiff's chosen forum, the court would have jurisdiction even though the defendant is not resident in that forum.[137] In such a case, the chosen forum would have a real and substantial connection with the subject matter of the litigation.

It may be possible to argue, by application of Canadian rule of the conflict of laws in relation to the enforcement of foreign judgments in Canada, that Canadian courts have jurisdiction over cases involving foreign elements. As a general rule, a foreign judgment is enforceable in Canada if the defendant submitted to the jurisdiction of the foreign court or was resident or present in the foreign country at the date of commencement of the action.[138] The enforcement of such a foreign judgment in the Canadian court necessarily connotes the assumption of jurisdiction over the foreign plaintiff at least in relation to the enforcement. This possibility does not, however, replace other tests for determining jurisdiction of Canadian courts as regards foreign elements though it is complementary to those tests.

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[135] *Ibid* at 202.

[136] *Ibid.* Note however that the learned author makes the point at 200 that jurisdiction based wholly on the mere presence of the defendant in a province "may not be sufficient to support the constitutional authority of a province and its courts to assert and exercise jurisdiction in such a case."

[137] See *Quest Vitamin Supplies Ltd. v. Hassam* (1992), 79 B.C.L.R. (2d) 85 (B.C.S.C.); *Canadian Commercial Bank v. Carpenter* (1989), 39 B.C.L.R. (2d) 312 (B.C.C.A.).

[138] See J.G. Castel, *supra* note 134 at 273 - 278.

In appropriate cases, however, the Canadian court may, even if it has jurisdiction to adjudicate on a matter involving a foreign element, decline jurisdiction on the ground that a more appropriate alternative forum exist to adjudicate the matter. This is done by applying the common law doctrine of *forum non conveniens.* That doctrine shall be briefly discussed shortly.

Although Canadian law has yet to crystalize in regard to the liability of Canadian corporations for civil wrongs which occur outside Canada, two requirements would appear vital to the assumption of jurisdiction by Canadian courts to adjudicate on such wrongs. The first, as enunciated by the Supreme Court of Canada in *Tolofson v. Jensen,*[139] is whether there is a "real and substantial connection" between the Canadian court and the subject of the litigation. As La Forest J. pointed out in that case, that "test has the effect of preventing a Court from unduly entering into matters in which the jurisdiction in which it is located has little interest."[140] What amounts to a 'real and substantial connection' would depend on the circumstances and facts of each case. It has been suggested that where service of court processes is effected *in juris* on a defendant ordinarily resident in Canada, it is unlikely that the Canadian court would decline jurisdiction on the basis of the real and substantial connection test.[141]

The second requirement is the common law doctrine of *forum non conveniens* under which the court may decline jurisdiction even if it has jurisdiction over the matter on ground that a better forum exist to adjudicate on it. In ascertaining this requirement, the court must determine

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[139] [1994] 3 S. C. R. 1022 (S. C. C.).

[140] *Ibid* at 1049.

[141] C. Forcese, *supra* note 132 at 202.

> whether there is another forum that is clearly more appropriate....(W)here there is no one forum that is the most appropriate, the domestic forum wins out by default ... provided it is an appropriate forum.[142]

The *forum non conveniens* doctrine is designed to ensure that an "action is tried in the jurisdiction that has the closest connection with the action and the parties."[143] The defendant, however, has the burden of satisfying the court that there is another forum which is clearly more appropriate for the trial of the action.[144] Some factors may influence the court in the determination of the appropriate forum. These factors include the residence and private interests of the parties, the possibility of "the loss of juridical advantage,"[145] the place where the cause of action arose, or the "relative advantages and obstacles to a fair trial."[146]

i.ii. Choice of Law

Where the Canadian court is the appropriate forum for adjudication over a wrong which occurred outside Canada, it may yet be faced with the issue of the appropriate law to be applied. In *Tolofson v. Jensen,*[147] the Supreme Court of Canada, held that the common law *lex loci delicti* doctrine applied in Canada and stated that "the law to be applied in torts is the law of the place where the activity occurred."[148] For our purpose here, the "place where the activity occurred" would be the country where the wrong or tort is alleged to have been committed by the corporation.[149]

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[142] *Amchen Products Inc. v. British Columbia (W.C.B.)*, [1993] 1 S. C. R. 897 at 931 (S.C.C.).

[143] *Ibid.* See also, Arbour J.A., in *Frymer v. Brettschneider* (1994), 19 O.R. (3d) 60 at 79 (Ont. C.A.).

[144] *Amchen Products Inc. v. British Columbia (W.C.B.), supra* note 142 at 921. See also, *Craig Broadcasting Systems, Inc. v. Frank N. Magid Associates, Inc.* (1998), 155 D.L.R. (4th) 356 at 367.

[145] The Supreme Court of Canada in *Amchem Products Inc. v. British Columbia* (W.C.B.), *supra* note 142 at 919.

[146] J.G. Castel, *supra* note 134 at 257-258.

[147] *Supra* note 139.

There is some indication that the common law *lex loci delicti* doctrine may permit of some exceptions in Canada. La Forest, J. gave that indication in *Tolofson* thus:

> I view the *lex loci delicti* rule as the governing law. However, because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.[150]

Thus, Canadian law would be applied where the *lex loci delicti* rule would work an injustice.[151] It is submitted that such would be the case where, for example, a legislation of the country where the wrong or tort occurred denies the plaintiff access to the local court or ousts the jurisdiction of that country's courts in adjudicating on the matter or 'if the lex loci delicti gave little or no recovery at all"[152] or the foreign country's law do not permit the type(s) of claim brought by the plaintiff in the Canadian court.[153]

ii. Substantive Obstacle: Legal Basis for Liability

Where the court determines the procedural issues discussed above in favour of a retention of jurisdiction, the plaintiff faces the burden of proving the liability of the corporation. There are, however, legal grounds to suggest that a plaintiff stands a chance to impute a corporation with liability in this regard by founding the action on the tort of negligence. Forcese argues that:

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[148] *Supra* note 139 at 1049 - 50.

[149] J. G. Castel, *supra* note 134 at 692 - 693.

[150] *Tolofson v. Jensen, supra* note 139 at 1054.

[151] *Hanlan et al v. Sernesky* (1998), 38 O.R. (3d) 479 at 480 (Ont. C.A.).

[152] J. G. Castel, *supra* note 134 at 687.

[153] *Hanlan v. Sernesky, supra* note 151.

> ... a successful negligence action for an act of militarized commerce would depend on the company having a duty of care to the victims and that it breach this duty. Further, harm must ensue and this harm must be sufficiently proximate to, and caused-in-fact by, the company's actions.[154]

Such an action, being based on negligence, would ordinarily be subjected to the legal tests for determining the duty and standard of care as enunciated in *Anns v. Merton London Borough Council*[155] and endorsed by the Supreme Court of Canada in *Kamloops v. Nielsen*[156] and, more recently, in *Hercules Managements Ltd. v. Ernst & Young*.[157] That test, which is two-way, is whether (1) there exist "a sufficiently close relationship" between the plaintiff and the defendant so that in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff, and (2) there are any considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed, or the damages to which a breach of it may give rise.[158]

Where, for purposes of argument, a Canadian corporation either finances the operations of the armed forces of a dictatorial foreign government so as to gain business concessions from that government, or invites such government to protect its facilities and the violation of human rights results therefrom, it is possible to argue, in such a case, that (1) the corporation owed a duty of care to the people of the area in which it did business, (2) the financing or invitation of the dictatorial government placed the people of the area at foreseeable risk since dictatorial governments are universally known to be despotic and brutal, and (3) the corporation was careless in inviting such government in the circumstances. Given such a scenario, it is hard to imagine any policy consideration which might negative the duty of care.

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[154] *Supra* note 132 at 209.

[155] [1977] 2 ALL E. R. 492.

[156] [1984] 2 S. C. R. 2 (S.C.C.).

[157] [1997] 2 S.C.R. 165 (S.C.C.).

[158] *Kamloops v. Nielsen, supra* note 156 at 10 - 11.

While the emerging signs of the possibility of maintaining an action in Canada against a Canadian corporation for wrongs or torts committed outside Canada is encouraging, the jurisdiction of Canadian courts to adjudicate on such cases might prove difficult to establish not only from the angle of 'real and substantial connection' but also on ground of *forum non conveniens.*[159] Thus, the probability of such claims progressing beyond the preliminary stage to actual trial would appear very little.

Canadian corporations may however be amenable to suits in the United States under the TVPA and ATCA if the requisite conditions are satisfied. Where a Canadian corporation alleged to be complicit in human rights violations abroad maintains 'minimum contact' with the United States, that corporation may be liable under those statutes as such minimum contact would confer jurisdiction on the United States court to adjudicate over the corporation.[160]

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[159] See, for example, *Recherches Internationales Quebec v. Cambior,* [1998] Q.J. No. 2554 (Que. S. C.), (QL) where the Quebec Superior Court, on ground of *forum non conveniens*, declined jurisdiction to entertain a claim arising from a toxic spill in Guyana. The case was instituted by Guyanese allegedly affected by the spill. The court held that Guyana was the most appropriate forum to entertain the claim. In arriving at this conclusion, the court considered, amongst other factors, the likelihood of a fair trial in Guyana, holding in the process at paragraph 98, that "the remedy sought by the victims is available to them in Guyana and that the delays for having their case heard in Guyana are reasonable compared to the delays that exist in this jurisdiction." Would the court in the above case have reached a different verdict on the forum if the case had arisen from a country with a dictatorial government? That question is open to argument. It is possible to argue that a different verdict would have been reached because dictatorial regimes often place severe limitations on the powers and independence of the judiciary thus making fair trial almost unattainable in such countries.

It is also suggested that Canada should explore the possibility of enacting a corporate code of conduct statute along the line of the TVPA and ATCA.[161] Such a legislation should however avoid the pitfalls inherent in the ATCA. In this regard, the suggested Act should: (1) specifically make it illegal for Canadian corporations and foreign corporations doing business in Canada to commit, or participate in the violation of human rights in whatever form abroad, (2) grant specific jurisdiction to Canadian courts to adjudicate on matters based on the Act, and (3) accord foreign victims temporary resident status so as to pursue their claims in Canadian courts.

Such a legislation would be in accord with the central focus of Canada's foreign policy which is stated to be the promotion of global human rights.[162] Canada would, by enacting such a statute, be sending a clear and powerful message to the rest of the world that commercial prosperity should and must not be achieved at the expense of human rights.

IV. Conclusion

I have sought to demonstrate herein that shareholders of multinational corporations, particularly those whose corporate activities causes social disequilibrium such as the violation of human rights and environmental degradation, have a role to play in ensuring corporate responsibility. In this regard, I analysed the shareholder proposals rule in the corporate laws of Canada. Whilst noting that the exceptions to that rule place too many restrictions on shareholder proposals particularly those touching on social policy issues, it is acknowledged that Bill S-11 goes a fair distance to obviating those concerns. What remains to be improved upon are two matters: first, the exception that permits exclusion of proposals on ground of abuse of the shareholders' right to secure publicity and, second, the requirement that proposals must relate to the affairs of the company "in a significant way" as contained in s. 137(5)(b.1) of Bill S-11. Such a streamlining and liberalization of the rule will permit social policy proposals which are related to the operations of the company.

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[160] See *Perkins v. Benguet Consolidated Mining Co.*, *supra* note 89.

[161] The Australian Parliament is presently debating the possibility of passing such a Bill. The Bill, titled 'Corporate Code of Conduct Bill 2000', seeks to stipulate environmental, health, safety, labour and human rights standards for Australian corporations employing more than 100 persons in a foreign country. For a draft of the Australian Bill, see online <http://www.aph.gov.au/senate/committee/corp_sec_ctte/corp_code.htm.>

[162] Human Rights in Canadian Foreign Policy, Online <http://www.gfait-maeci.gc.ca/human-rights/forpol-e.asp>, date accessed: 15 September, 2001.

A liberalised CBCA shareholder proposals rule would avail Canadian shareholders a more viable opportunity to exact a higher standard of corporate responsibility from corporations and may thus enure to the benefit of citizens of foreign countries like Nigeria in this era of corporate globalization. It was also suggested that the CAMA be reformed by liberalising the shareholder proposals rule.

I have also attempted an analysis of U.S. and Canadian civil laws with the aim of ascertaining whether multinational corporations can be held liable under those laws for complicity in human rights violations committed outside those countries. In this regard, I placed special emphasis on the provisions of the United States TVPA and ATCA. Whilst noting that these statutes represent a commendable milestone in the quest for corporate responsibility, I nevertheless suggested that they be amended in view of the numerous procedural, substantive and logistics problems facing foreign plaintiffs seeking relief(s) under the statutes. I also suggested that Canada should consider enacting a statute along the lines of the TVPA and ATCA.

In sum, this chapter underscored the fact that the laws and regulations of foreign countries could, in two ways, help to promote corporate responsibility in Nigeria. First, the shareholder proposals rule could be utilized by shareholders to influence corporate conduct within and outside Canada towards the direction of corporate responsibility by the oil and gas companies. Second, the fact that corporations could be liable under statutes such as the TVPA and ATCA, and possibly under Canadian civil law, for human rights infractions committed outside the U.S.A and Canada may serve to keep multinational corporations doing business in Nigeria in check.

In this way, legal resources in developed countries such as Canada can be used to improve human rights and environmental protection in a developing country like Nigeria. This would have the spiral effect of enhancing the social and economic quality of life in the developing countries.

CONCLUSION

My central aim in undertaking this research was to explore the corporate social responsibility concept with a view to proposing changes to Nigerian corporate law and policy. It is thought that such changes are, perhaps, the most viable antidote to the lingering environmental and human rights crisis in Nigeria's oil and gas producing communities, a crisis which has defied solution for over three decades. In other words, the thrust of this thesis has been to evolve possible ameliorative strategies, based on corporate law, to the negative externalities of the corporate activities of the oil and gas companies in the oil producing region of Nigeria.

Chapter 1 explored the contending issues in the often heated debate between advocates of the corporate social responsibility concept on the one hand, and the shareholder wealth maximization norm on the other. It sought to establish that corporations, in addition to being economic entities, are social entities as well. In the latter capacity, corporations affect, positively and negatively, a wide range of constituencies other than just the shareholders. Consequently, the Chapter advocated that corporate law which currently focuses almost exclusively on shareholders ought more actively seek to prevent or at least seek to limit, on a greater scale, the negative externalities of corporate activity on non-shareholder constituencies.

Whilst acknowledging that there exists a conflict between the shareholder wealth maximization and the corporate responsibility concept, the chapter suggested that such conflict can be resolved by replacing the primacy and paramountcy of the shareholder wealth maximization norm with a legal regime that empowers corporate directors to consider the interests of a clearly specified class of non-shareholder constituencies contemporaneously with those of the shareholders. A useful first step in this regard would be to shift emphasis from profit maximization to profit optimization. This step is premised, in part, on the fact that the 'fiduciary and principal / agency' paradigm on which the contractarian theory is based does not reflect the reality in corporate law as it disregards the corporate separate personality principle. Moreover, contrary to the assumption of contractarian theorists, not everyone who might be adversely affected by corporate activity has the resources to contract freely so as to prevent or limit those effects. This is especially the case in a developing country like Nigeria where the majority of those who suffer negative corporate externalities are poor, illiterate and without resources. The chapter thus identified and justified a shift towards a form of corporate governance which acknowledges the limit of the contractarian model and embraces the view that outside stakeholders are entitled to greater consideration and protection than they currently see. This analysis also provided the foundation for the arguments and suggestions in the subsequent chapters.

Chapter 2 contextualized the lack of corporate social responsibility in Nigeria's oil and gas producing communities. The chapter, in the main, attempted to establish evidence of culpability on the part of the oil and gas companies in Nigeria by exploring the causal connection between their corporate activities and the environmental and human rights crisis in the communities. Whilst acknowledging that the environmental and human rights quagmire in those communities is caused, in part, by the persistent neglect of the region by the Nigerian government coupled with the high-handedness of the government and its security agencies, it nevertheless posited that the multinational oil and gas corporations doing business in the country are also partly responsible for same.

Chapter 3 sought to offer possible solutions to the crisis in the oil and gas producing communities of Nigeria by suggesting increased duties on corporate directors and on the Corporate Affairs Commission of Nigeria. It recommended a reform of the *Companies and Allied Matters Act* (hereinafter "the CAMA") through:

(1) the strengthening of the Corporate Affairs Commission so as to make it independent from the executive arm of government by changing the composition of its membership to include representatives of non-shareholder constituencies, the provision of adequately trained personnel and finance. This would ensure its efficiency particularly as regards the use of its regulatory and supervisory powers for the protection of the public against the negative externalities of corporate activity;

(2) the enlargement of the fiduciary duties of company directors to include a duty to consider the interests of the host communities in the corporate decision - making process. The host communities should, in turn, be granted a legal right to sue the company and or the directors for breach of the duty under clearly defined procedural rules of enforcement;

(3) a restructuring of the corporate boards of large public companies to include a 'general public director' or a representative(s) of the host communities.

Chapter 4 examined how shareholders outside of Nigeria can insist on corporate social responsibility. It considered the shareholder proposals rule under the *Canada Business Corporations Act* with a view to ascertaining whether the rule affords shareholders a viable mechanism through which to influence corporate governance towards corporate responsibility. It also analysed the liability of corporations under United States and Canadian civil laws for civil wrongs or torts committed outside the shores of those countries. The chapter sought to establish that the laws and statutes of the countries of registration or *lex domicilii* of multinational corporations could be useful in curbing corporate irresponsibility in foreign countries in which such corporations do business. It also recommended the liberalization of the CAMA shareholder proposals rule so as to afford Nigerian shareholders a better opportunity to partake in and influence corporate governance.

In all, this thesis recommended the entrenchment of the corporate social responsibility concept into the law of Nigeria given past difficulties with human rights violations and environmental degradation. By making directors more accountable to outside constituencies, providing greater government supervision of corporate activity, and arming shareholders with improved methods of influencing corporate governance, the law can also assist in delivering a stable and conducive atmosphere for individuals and business.

It is also worth observing that these suggested reforms have resonance with existing Nigerian law. First, the *Constitution* of Nigeria provides a basis for the concept of corporate social responsibility as it, amongst others, enjoins the government to prevent the exploitation of human and natural resources for reasons other than the good of the community.[1] Second, corporate responsibility does not, in and of itself, necessarily reduce corporate profitability. Several academic studies and research have shown that positive correlations exist between corporate social performance and financial performance.[2] Indeed,

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[1] See the *Constitution of the Federal Republic of Nigeria 1999*, s.17 (1) & (2) (d). See also ss.16 (b) & 24 (d) thereof.

> ... nearly all empirical studies to date have concluded that firms that are perceived as having met social responsibility criteria have either outperformed or performed as well as other firms that are not necessarily socially responsible.[3]

Third, as we saw in Chapter 3, managing a company in a socially responsible manner is arguably consistent with the director's fiduciary duty to act in the best interests of the company in any event. Accordingly, the proposals for reform offered in this thesis can also be regarded as building on an existing foundation. In short, the thesis builds on existing law and is not necessarily a denial of it.

The corporate responsibility concept, it would appear, is gaining increased universal resonance both within the business community[4] and for the public. As some observers point out

> ...corporate responsibility has become an important measure of a corporation's merit. If present trends continue, there may well come a time when corporate profitability is impossible without responsibility and accountability to a broader public.[5]

Legal developments in Nigeria seem not to have recognised this, at least to date. For the future, it is hoped that the suggestions for reform contained in this thesis will provide a basis for the nurturing of an enduring and mutually beneficial symbiotic relationship between

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[2] See J.D. Margolis & J.P. Walsh, *People and Profits? The search for a Link Between a Company's Social and Financial Performance* (New Jersey: Lawrence Erlbaum Associates, 2001) at 1 - 14.

[3] M.L. Pava & J. Krausz, *Corporate Responsibility and Financial Performance: The Paradox of Social Cost* (Connecticut: Quorum Books, 1995) at 15.

[4] See the Organisation for Economic Co-Operation and Development (OECD), *Corporate Responsibility: Private Initiatives and Public Goals* (Paris: OECD, 2001) at 1. See also, S. Loizides & G. Khoury, *Corporate Responsibility in Developing Countries: Key Success Factors* (Ottawa: The Conference Board of Canada, 1996) at 1 - 2.

[5] The Canadian Democracy and Corporate Accountability Commission, "Executive Summary" online <http://www.corporate-accountability.ca > date accessed: October 28, 2001.

Nigerian companies on the one hand and their host communities on the other. The status quo is not acceptable.

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APPENDIX A

Federal Republic of Nigeria
Official Gazette

No. 2 Lagos - 9th January, 1990 Vol. 77

Government Notice No. 9

The following are published as supplement to this *Gazette* :—

Short Title	*Page*
Decree No. 1 Companies and Allied Matters Decree 1990	A 1

PART X—PROTECTION OF MINORITY AGAINST ILLEGAL AND OPPRESSIVE CONDUCT

Action by or against the company

Only company may use for wrong or ratify irregular conduct.

299. Subject to the provisions of this Decree, where irregularity has been committed in the course of a company's affairs or any wrong has been done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct.

Protection of minority : injunction and declaration in certain cases.

300. Without prejudice to the rights of members under sections 303 to 308 and sections 310 to 312 of this Decree or any other provisions of this Decree, the court, on the application of any member, may by injunction or declaration restrain the company from the following—

(*a*) entering into any transaction which is illegal or *ultra vires* ;

(*b*) purporting to do by ordinary resolution any act which by its constitution or the Decree requires to be done by special resolution ;

(*c*) any act or omission affecting the applicant's individual rights as a member ;

(*d*) committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done ;

(*e*) where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders ; and

(*f*) where the directors are likely to derive a profit or benefit, or have profited or benefited from their negligence or from their breach of duty.

Personal and representative action.

301.—(1) Where a member institutes a personal action to enforce a right due to him personally, he shall not be entitled to any damages but to declaration or injunction to restrain the company and/or the directors from doing a particular act.

(2) Where a member institutes a representative action on behalf of himself and other affected members to enforce any rights due to them, he shall not be entitled to any damages but to a declaration or injunction to restrain the company and/or directors from doing a particular act.

(3) Where any member institutes an action under this section, the court may award costs to him personally whether or not his action succeeds.

(4) In any proceedings by a member under section 300 of this Decree, the court may, if it thinks fit order that the member shall give security for costs.

Definition of member.

302. For the purpose of sections 300 and 301 of this Decree, "member" includes—

(*a*) the personal representative of a deceased member ; and

(*b*) any person to whom shares have been transferred or transmitted by operation of law.

Commencing derivative action.

303.—(1) Subject to the provisions of subsection (2) of this section, an applicant may apply to the court for leave to bring an action in the name or on behalf of a company, or to intervene in an action to which the company is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.

(2) No action may be brought and no intervention may be made under subsection (1) of this section, unless the court is satisfied that—

(*a*) the wrongdoers are the directors who are in control, and will not take necessary action ;

(*b*) the applicant has given reasonable notice to the directors of the company of his intention to apply to the court under subsection (1) of this section if the directors of the company do not bring, diligently prosecute or defend or discontinue the action ;

(*c*) the applicant is acting in good faith ; and

(*d*) it appears to be in the best interest of the company that the action be brought, prosecuted, defended or discontinued.

Powers of the Court.

304.—(1) In connection with an action brought or intervened under section 303 of this section, the court may at any time make any such order or orders, as it thinks fit.

(2) Without prejudice to the generality of subsection (1) of this section, the court may make one or more of the following orders, that is an order—

(*a*) authorising the applicant or any other person to control the conduct of the action ;

(*b*) giving directions for the conduct of the action ;

(*c*) directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the company instead of to the company ;

(*d*) requiring the company to pay reasonable legal fees incurred by the applicant in connection with the proceedings.

Evidence of shareholders approval not decisive.

305. An application made or an action brought or intervened in under section 303 of this Decree shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or a duty owed to the company has been or may be approved by the shareholders of such company, but evidence of approval by the shareholders may be taken into account by the Court in making an order under section 304 of this Decree.

Court's approval to discontinue.

306. An application made or an action brought or intervened in under section 303 of this Decree shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the court given upon such terms as the court thinks fit and, if the court determines that the rights of any applicant may be substantially affected by such stay, discontinuance, settlement or dismissal, the court may order any party to the application or action to give notice to the applicant.

No security for costs.

307. An applicant shall not be required to give security for costs in any application made or action brought or intervened in under section 303 of this Decree.

Interim costs.

308. In an application made or an action brought or intervened in under section 303 of this Decree, the court may at any time order the company to pay to the applicant interim costs before the final disposition of the application or action.

Definition.

309. In sections 303 to 308 of this Decree, "applicant" means—

(*a*) a registered holder or a beneficial owner and a former registered holder or beneficial owner, of a security of a company ;

(*b*) a director or an officer or a former director or officer of a company ;

(*c*) the Commission ; or

(*d*) any other person who in the discretion of the court, is a proper person to make an application under section 303 of this Decree.

Relief on the grounds of unfairly prejudicial and oppressive conduct

Application.

310.—(1) An application to the Court by petition for an order under section 311 of this Decree in relation to a company may be made by any of the following persons—

(*a*) a member of the company ;

(*b*) a director or officer or former director or officer of the company ;

(*c*) a creditor ;

(*d*) the Commission ; or

(*e*) any other person who, in the discretion of the court, is the proper person to make an application under section 311 of this Decree.

(2) In sections 311 to 313 of this Decree, "member" includes—

(*a*) the personal representative of a deceased member ; and

(*b*) any person to whom shares have been transferred or transmitted by operation of law.

Grounds upon whi an application may made.

311.—(1) An application for relief on the ground that the affairs of a company are being conducted in an illegal or oppressive manner may be made to the court by petition.

(2) An application to the court by petition for an order under this section in relation to a company may be made—

(*a*) by a member of the company who alleges—

(*i*) that the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is in disregard of the interests of a member of the members as a whole ; or

(*ii*) that an act or omission or a proposed act or omission, by or on behalf of the company or a resolution, or a proposed resolution, of a class of members, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be in a manner which is in disregard of the interests of a member or the members as a whole ; or

(*b*) by any of the persons mentioned under paragraphs (*b*) (*c*) and (*e*) of subsection (1) of section 310 of this Decree who alleges—

(*i*) that the affairs of the company are being conducted in a manner oppressive or unfairly prejudicial to or discriminatory against or in a manner in disregard of the interests of that person ;

(*ii*) that an act or omission, or a proposed act or omission was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, or which is in a manner in disregard of the interests of that person, or

(*c*) by the Commission in a case where it appears to it in the exercise of its powers under the provisions of this Decree or any other enactment that—

(*i*) the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members or in a manner which is in disregard of the public interest ; or

(*ii*) any actual or proposed act or omission of the company (including an act or omission on its behalf) which was or would be oppressive, or unfairly prejudicial to, or unfairly discriminatory against a member or members in a manner which is in disregard of the public interests.

Powers of the court

312.—(1) If the court is satisfied that a petition under sections 310 and 311 of this Decree is well founded, it may make such order or orders as it thinks fit for giving relief in respect of the matter complained of.

(2) Without prejudice to the generality of subsection (1) of this section, the court may make one or more of the following orders that is, an order—

(*a*) that the company be wound up ;

(*b*) for regulating the conduct of the affairs of the company in future ;

(*c*) for the purchase of the shares of any member by other members of the company ;

(*d*) for the purchase of the shares of any member by the company and for the reduction accordingly of the company's capital ;

(*e*) directing the company to institute, prosecute, defend or discontinue specific proceedings, or authorizing a member or members or the company to institute, prosecute, defend or discontinue specific proceedings in the name or on behalf of the company ;

(*f*) varying or setting aside a transaction or contract to which the company is a party and compensating the company or any other party to the transaction or contract ;

(*g*) directing an investigation to be made by the Commission ;

(*h*) appointing a receiver or a receiver and manager of property of the company ;

(*i*) restraining a person from engaging in specific conduct or from doing a specific act or thing ;

(*j*) requiring a person to do a specific act or thing.

(3) Where an order that a company be wound up is made under this section, the provisions of this Decree relating to winding up of companies shall apply, with such adaptations as are necessary, as if the order had been made upon an application duly filed in the court by the company.

(4) Where an order under this section makes any alteration in addition to the memorandum or articles of a company, then, notwithstanding anything in any other provision of this Decree but subject to the provisions of the order, the company shall not have power, without the leave of the court, to make any further alteration or addition to the memorandum and articles inconsistent with the provisions of the order but, subject to the foregoing provisions of this subsection, the alteration or addition shall have effect as if it had been duly made by a resolution of the company.

(5) A certified true copy of an order made under this section altering or giving leave to alter, a company's memorandum or articles shall, within 14 days from the making of the order or such longer period as the court may allow, be delivered by the company to the Commission for registration; and if the company makes default in complying with the provisions of this subsection, the company and every officer of it who is in default shall be guilty of an offence and liable to a fine of N50 and, for continued contravention, to a daily default fine of N25.

Penalty for failure to comply with order of the court.

313. Any person who contravenes or fails to comply with an order made under section 312 of this Decree that is applicable to him shall be guilty of an offence and be liable to a fine of N500 or imprisonment for one year or to both such fine and imprisonment.

Investigation of companies and their affairs

Investigation of a company on its own application or that of its members.

314.—(1) The Commission may appoint one or more competent inspectors to investigate the affairs of a company and to report on them in such manner as it may direct.

(2) The appointment may be made—

(*a*) in the case of a company having a share capital on the application of members holding not less than one-quarter of the class of shares issued ;

APPENDIX B

Constitution of the Federal Republic of Nigeria 1999

CHAPTER II

FUNDAMENTAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLICY

13. It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution.

14.- (1) The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice.

(2) It is hereby, accordingly, declared that -

(a) sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority;

(b) the security and welfare of the people shall be the primary purpose of government;: and

(c) the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution.

(3) The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in that Government or in any of its agencies.

(4) The composition of the Government of a State, a local government council, or any of the agencies of such Government or council, and the conduct of the affairs of the Government or council or such agencies shall be carried out in such manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation.

15.- (1) The motto of the Federal Republic of Nigeria shall be Unity and Faith, Peace and Progress.

(2) Accordingly, national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited.

(3) For the purpose of promoting national integration, it shall be the duty of the State to:

(a) provide adequate facilities for and encourage free mobility of people, goods and services throughtout the Federation.

(b) secure full residence rights for every citizen in all parts of the Federation.

(c) encourage inter-marriage among persons from different places of origin, or of different religious, ethnic or linguistic association or ties; and

(d) promote or encourage the formation of associations that cut across ethnic, linguistic, religious and or other sectional barriers.

(4) The State shall foster a feeling of belonging and of involvement among the various peoples of the Federation, to the end that loyalty to the nation shall override sectional loyalties.

(5) The State shall abolish all corrupt practices and abuse of power.

16.- (1) The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution-

(a) harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy;

(b) control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity;

(c) without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy;

(d) without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.

(2) The State shall direct its policy towards ensuring:

(a) the promotion of a planned and balanced economic development;

(b) that the material resources of the nation are harnessed and distributed as best as possible to serve the common good;

(c) that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group; and

(d) that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.

(3) A body shall be set up by an Act of the National Assembly which shall have power-

(a) to review, from time to time, the ownership and control of business enterprises operating in Nigeria and make recommendations to the President on same; and

(b) to administer any law for the regulation of the ownership and control of such enterprises.

(4) For the purposes of subsection (1) of this section -

(a) the reference to the "major sectors of the economy" shall be construed as a reference to such economic activities as may, from time to time, be declared by a resolution of each House of the National Assembly to be managed and operated exclusively by the Government of the Federation, and until a resolution to the contrary is made by the National Assembly, economic activities being operated exclusively by the Government of the Federation on the date immediately preceding the day when this section comes into force, whether directly or through the agencies of a statutory or other corporation or company, shall be deemed to be major sectors of the economy;

(b) "economic activities" includes activities directly concerned with the production, distribution and exchange of wealth or of goods and services; and

(c) "participate" includes the rendering of services and supplying of goods.

17.- (1) The State social order is founded on ideals of Freedom, Equality and Justice.

(2) In furtherance of the social order-

(a) every citizen shall have equality of rights, obligations and opportunities before the law;

(b) the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced;

(c) governmental actions shall be humane;

(d) exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented; and

(e) the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.

(3) The State shall direct its policy towards ensuring that-

(a) all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment;

(b) conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life;

(c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused;

(d) there are adequate medical and health facilities for all persons:

(e) there is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever;

(f) children, young persons and the aged are protected against any exploitation whatsoever, and against moral and material neglect;

(g) provision is made for public assistance in deserving cases or other conditions of need; and

(h) the evolution and promotion of family life is encouraged.

18. - (1) Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.

(2) Government shall promote science and technology

(3) Goverment shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide -

(a) free, compulsory and universal primary education;

(b) free secondary education;

(c) free university education; and

(d) free adult literacy programme.

19. The foreign policy objectives shall be -

(a) promotion and protection of the national interest;

(b) promotion of African integration and support for African unity;

(c) promotion of international co-operation for the consolidation of universal peace and mutual respect among all nations and elimination of discrimination in all its manifestations;

(d) respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication; and

(e) promotion of a just world economic order.

20. The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.

21. The State shall -

(a) protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this Chapter; and

(b) encourage development of technological and scientific studies which enhance cultural values.

22. The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this Chapter and uphold the responsibility and accountability of the Government to the people.

23. The national ethics shall be Discipline, Integrity, Dignity of Labour, Social Justice, Religious Tolerance, Self-reliance and Patriotism.

24. It shall be the duty of every citizen to -

(a) abide by this Constitution, respect its ideals and its institutions, the National Flag, the National Anthem, the National Pledge, and legitimate authorities;

(b) help to enhance the power, prestige and good name of Nigeria, defend Nigeria and render such national service as may be required;

(c) respect the dignity of other citizens and the rights and legitimate interests of others and live in unity and harmony and in the spirit of common brotherhood;

(d) make positive and useful contribution to the advancement, progress and well-being of the community where he resides;

(e) render assistance to appropriate and lawful agencies in the maintenance of law and order; and

(f) declare his income honestly to appropriate and lawful agencies and pay his tax promptly.

APPENDIX C

Constitution of the Federal Republic of Nigeria 1999

CHAPTER IV

FUNDAMENTAL RIGHTS

33 - (1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

(2) A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary -

(a) for the defence of any person from unlawful violence or for the defence of property:

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or

(c) for the purpose of suppressing a riot, insurrection or mutiny.

34. - (1) Every individual is entitled to respect for the dignity of his person, and accordingly -

(a) no person shall be subject to torture or to inhuman or degrading treatment;

(b) no person shall he held in slavery or servitude; and

(c) no person shall be required to perform forced or compulsory labour.

(2) For the purposes of subsection (1) (c) of this section, "forced or compulsory labour" does not include -

(a) any labour required in consequence of the sentence or order of a court;

(b) any labour required of members of the armed forces of the Federation or the Nigeria Police Force in pursuance of their duties as such;

(c) in the case of persons who have conscientious objections to service in the armed forces of the Federation, any labour required instead of such service;

(d) any labour required which is reasonably necessary in the event of any emergency or calamity threatening the life or well-being of the community; or

(e) any labour or service that forms part of -

(i) normal communal or other civic obligations of the well-being of the community.

(ii) such compulsory national service in the armed forces of the Federation as may be prescribed by an Act of the National Assembly, or

(iii) such compulsory national service which forms part of the education and training of citizens of Nigeria as may be prescribed by an Act of the National Assembly.

35. - (1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law -

(a) in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty;

(b) by reason of his failure to comply with the order of a court or in order to secure the fulfilment of any obligation imposed upon him by law;

(c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence;

(d) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;

(e) in the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or

(f) for the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto:

Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.

(2) Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice.

(3) Any person who is arrested or detained shall be informed in writing within twenty-four hours (and in a language that he understands) of the facts and grounds for his arrest or detention.

(4) Any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of -

(a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or

(b) three months from the date of his arrest or detention in the case of a person who has been released on bail,

he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

(5) In subsection (4) of this section, the expression "a reasonable time" means -

(a) in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometres, a period of one day; and

(b) in any other case, a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable.

(6) Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person; and in this subsection, "the appropriate authority or person" means an authority or person specified by law.

(7) Nothing in this section shall be construed -

(a) in relation to subsection (4) of this section, as applying in the case of a person arrested or detained upon reasonable suspicion of having committed a capital offence; and

(b) as invalidating any law by reason only that it authorises the detention for a period not exceeding three months of a member of the armed forces of the federation or a member of the Nigeria Police Force in execution of a sentence imposed by an officer of the armed forces of the Federation or of the Nigeria police force, in respect of an offence punishable by such detention of which he has been found guilty.

36 - (1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

(2) Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law -

(a) provides for an opportunity for the persons whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person; and

(b) contains no provision making the determination of the administering authority final and conclusive.

(3) The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public.

(4) Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal:

Provided that -

(a) a court or such a tribunal may exclude from its proceedings persons other than the parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice;

(b) if in any proceedings before a court or such a tribunal, a Minister of the Government of the Federation or a commissioner of the government of a State satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter.

(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty:

Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.

(6) Every person who is charged with a criminal offence shall be entitled to -

(a) be informed promptly in the language that he understands and in detail of the nature of the offence;

(b) be given adequate time and facilities for the preparation of his defence;

(c) defend himself in person or by legal practitioners of his own choice;

(d) examine, in person or by his legal practitioners, the witnesses called by the prosecution before any court or tribunal and obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court or tribunal on the same conditions as those applying to the witnesses called by the prosecution; and

(e) have, without payment, the assistance of an interpreter if he cannot understand the language used at the trial of the offence.

(7) When any person is tried for any criminal offence, the court or tribunal shall keep a record of the proceedings and the accused person or any persons authorised by him in that behalf shall be entitled to obtain copies of the judgment in the case within seven days of the conclusion of the case.

(8) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed

(9) No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court.

(10) No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence.

(11) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

(12) Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

37. The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.

38. - (1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian.

(3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.

(4) Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society.

39. - (1) Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

(2) Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions:

Provided that no person, other than the Government of the Federation or of a State or any other person or body authorised by the President on the fulfilment of conditions laid down by an Act of the National Assembly, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.

(3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society -

(a) for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or

(b) imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force or other Government security services or agencies established by law.

40.- Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests:

Provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which that Commission does not accord recognition.

41. - (1) Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit therefrom.

(2) Nothing in subsection (1) of this section shall invalidate any law that is reasonably justifiable in a democratic society-

(a) imposing restrictions on the residence or movement of any person who has committed or is reasonably suspected to have committed a criminal offence in order to prevent him from leaving Nigeria; or

(b) providing for the removal of any person from Nigeria to any other country to:-

(i) be tried outside Nigeria for any criminal offence, or

(ii) undergo imprisonment outside Nigeria in execution of the sentence of a court of law in respect of a criminal offence of which he has been found guilty:

Provided that there is reciprocal agreement between Nigeria and such other country in relation to such matter.

42.- (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

(3) Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Forces or to an office in the service of a body corporate established directly by any law in force in Nigeria.

43. Subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.

44.- (1) No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things -

(a) requires the prompt payment of compensation therefor; and

(b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

(2) Nothing in subsection (1) of this section shall be construed as affecting any general law-

(a) for the imposition or enforcement of any tax, rate or duty;

(b) for the imposition of penalties or forfeiture for breach of any law, whether under civil process or after conviction for an offence;

(c) relating to leases, tenancies, mortgages, charges, bills of sale or any other rights or obligations arising out of contracts.

(d) relating to the vesting and administration of property of persons adjudged or otherwise declared bankrupt or insolvent, of persons of unsound mind or deceased persons, and of corporate or unincorporate bodies in the course of being wound-up;

(e) relating to the execution of judgements or orders of court;

(f) providing for the taking of possession of property that is in a dangerous state or is injurious to the health of human beings, plants or animals;

(g) relating to enemy property;

(h) relating to trusts and trustees;

(i) relating to limitation of actions;

(j) relating to property vested in bodies corporate directly established by any law in force in Nigeria;

(k) relating to the temporary taking of possession of property for the purpose of any examination, investigation or enquiry;

(l) providing for the carrying out of work on land for the purpose of soil-conservation; or

(m) subject to prompt payment of compensation for damage to buildings, economic trees or crops, providing for any authority or person to enter, survey or dig any land, or to lay, install or erect poles, cables, wires, pipes, or other conductors or structures on any land, in order to provide or maintain the supply or distribution of energy, fuel, water, sewage, telecommunication services or other public facilities or public utilities.

(3) Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

45.- (1) Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society

(a) in the interest of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedom or other persons.

(2) An act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of section 33 or 35 of this Constitution; but no such measures shall be taken in pursuance of any such act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency:

Provided that nothing in this section shall authorise any derogation from the provisions of section 33 of this Constitution, except in respect of death resulting from acts of war or authorise any derogation from the provisions of section 36(8) of this Constitution.

(3) In this section, a " period of emergency" means any period during which there is in force a Proclamation of a state of emergency declared by the President in exercise of the powers conferred on him under section 305 of this Constitution.

46.- (1) Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.

(2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that State of any right to which the person who makes the application may be entitled under this Chapter.

(3) The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purposes of this section.

(4) The National Assembly -

(a) may confer upon a High Court such powers in addition to those conferred by this section as may appear to the National Assembly to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by this section; and

(b) shall make provisions-

(i) for the rendering of financial assistance to any indigent citizen of Nigeria where his right under this Chapter has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim, and

(ii) for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real.